Supreme Court, U.S.
FILED
AUG 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-359

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE CITY OF NEW YORK, et al.,

Petitioners,

-against-

EASTWAY CONSTRUCTION CORP., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETER L. ZIMROTH,
Corporation Counsel of
the City of New York,
Attorney for Petitioners,
100 Church Street,
New York, N.Y. 10007.
(212) 566-4328 or 4338

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
JOHN P. WOODS,
FRED KOLIKOFF,
of Counsel.

August 28, 1987

*Counsel of Record

QUESTION PRESENTED

When it has been held that a plaintiff's action is frivolous, and a defendant is entitled to a reasonable attorney's fee, pursuant to 42 U.S.C. §1988 and Fed. R. Civ. P. 11, and there is no showing that the plaintiff or his attorney would be unduly burdened by a full fee award, should a court compute the fee by using the "lodestar" method that is used when fees are awarded to prevailing plaintiffs, or, as the majority below held, may the court disregard the lodestar and award an arbitray amount which has no relation to the actual cost of representation?

PARTIES

The parties in this case, when it commenced, were as follows:

1. Eastway Construction Corp., plaintiff.

2. George Jaffee, plaintiff.

3. Irving H. Kanarek, plaintiff.

4. Roger Jacobs, plaintiff.

5. The City of New York, defendant.

6. Nathan Leventhal, individually and as Deputy Mayor of the City of New York, defendant.

7. Anthony G. Gliedman, individually and as Commissioner of the New York City Department of Housing Preservation and Development, defendant.

8. Charles Reiss, individually and as Deputy Commissioner of the New York City Office of Development, defendant.

9. The Community Preservation Corporation, defendant.

10. Michael Lappin, individually and as President of the Community Preservation Corporation, defendant.

11. John Does one through fifty, defendants.

12. Chemical Bank N.A., defendant.

The petitioners are parties 5 through 7, defendants below.

The respondents are parties 1 through 4, plaintiffs below. In addition, LaRossa Mitchell & Ross, plaintiffs' attorneys, are also respondents because the United States Court of Appeals for the Second Circuit held that plaintiffs' attorneys should pay half of the $10,000 in attorneys' fees which petitioners should receive. If a writ of certiorari is issued, petitioners will argue before this Court that the total amount of

fees they should receive is in excess of $50,000. Since petitioners do not challenge the allocation of the fee award set by the Second Circuit, the plaintiffs' attorneys now have a direct interest in this case. To distinguish them from the other respondents, the law firm of LaRossa, Mitchell & Ross will be referred to herein as "respondent law firm." The word "respondents" will be used to refer to the other respondents and the phrase "all respondents" will be used to refer to all respondents including the respondent law firm.

Parties 9 and 10, defendants below, did not cross-appeal from the District Court's denial of their motion for attorney's fees, and thus ceased to have an interest in this case on May 21, 1985, when the United States Court of Appeals for the Second Circuit affirmed the dismissal of the case

against all parties. Defendants 11 and 12 did not appear in this proceeding.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	vii
OPINIONS BELOW	2
JURISDICTION	3
STATUTES	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	23
CONCLUSION	50

TABLE OF AUTHORITIES

	Page
Cases	
Arnold v. Burger King Corp., 719 F.2d 63 (4th Cir. 1983), cert. denied, 469 U.S. 826 (1984)	27
Blum v. Stenson, 465 U.S. 886 (1984)	33
Eastway Construction Corp. v. Gleidman, 86 A.D.2d 575, 446 N.Y.S.2d 306 (1st Dept. 1982), appeal withdrawn or discontinued, 58 N.Y. 2d 972, no other citation (1983)	7
Faraci v. Hickey - Freeman Co., 607 F.2d 1025 (2d Cir. 1979)	29, 36 37
Hensley v. Eckerhart, 461 U.S. 424 (1983)	32, 34 40, 48
In re Cosmopolitan Aviation Corp., 763 F.2d 507 (2d Cir. 1985), cert. denied sub nom, Rothman v. New York State Dept. of Transp., ___ U.S. ___, 106 S. Ct. 593 (1985)	37
Index Fund, Inc. v. Hagopian 107 F.R.D. 95 (S.D.N.Y. 1985) ...	37
Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974)	36

Johnson v. NYCTA, 639 F. Supp. 887 (S.D.N.Y. 1986) 43

Johnson v. NYCTA, ___ F. Supp. ___, Nos. 83 Civ. 1352, 85 Civ. 0629 (E.D.N.Y. August 5, 1986) 44, 45

Johnson v. NYCTA, __ F.2d __, Docket No. 86 - 7406 (2d Cir. July 9, 1987) 43, 45

Jones v. Dealers Tractor and Equipment Co., 634 F.2d 180 (5th Cir. 1981) 36

Munson v. Friske, 754 F.2d 683 (7th Cir. 1985) 27

Nash v. Reedel, 86 F.R.D. 16 (E.D. Pa. 1980) 37

Patterson v. Aiken, 111 F.R.D. 354 (N.D. Ga. 1986) 37

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, __ U.S. __, 106 S. Ct. 3088 (1986) 35

Prate v. Freedman, 583 F.2d 42 (2d Cir. 1978) 36

Taylor v. Prudential-Bache Securities, Inc., 594 F. Supp. 226 (1984), aff'd mem., 751 F.2d 371 (2d Cir. 1984) 37

Statutes

7 U.S.C. §2565 (Plant Variety Protection Act of 1970) 38

15 U.S.C. §77k(e) (Securities Exchange Act of 1934) 38

17 U.S.C. §505 (Copyright Act of 1976) 38

29 U.S.C. §1132(g)(1) (Employee Retirement Income Security Act of 1974) 38

33 U.S.C. §1415(g)(4) (Marine Protection, Research, and Sanctuaries Act of 1972) 39

42 U.S.C. §1973(1)(e) (Voting Rights Act Amendments of 1973) 39

42 U.S.C. §1988 (Civil Rights Attorney's Fees Act of 1976) ..... passim

42 U.S.C. §2000e-5(k) (Civil Rights Act of 1964) 28, 29 44

42 U.S.C. §7604(d) (Clean Air Amendments of 1970) 35, 39

Fed. R. Civ. P. 11 ..... passim

Fed. R. Civ. P. 16(f) 39

Fed. R. Civ. P. 26(g) 39

Fed. R. Civ. P. 37(b)(2)(e) 39

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE CITY OF NEW YORK, et al.,

Petitioners,

-against-

EASTWAY CONSTRUCTION CORP., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, the City of New York, Nathan Leventhal, Anthony G. Gliedman, and Charles Reiss, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on June 8, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals dated June 8, 1987 is reported at 821 F.2d 121 (2d Cir. 1987). A copy is reprinted in the Appendix at page 1. The opinion of the United States District Court for the Eastern District of New York dated May 23, 1986 is reported at 637 F. Supp 558 (E.D.N.Y. 1986). A copy is reprinted in the Appendix at page 28. The opinion of the Court of Appeals dated May 21, 1985 is reported at 762 F.2d 243 (2d Cir. 1985). A copy is reprinted in the Appendix at page 144. The amended judgment of the United States District Court for the Eastern District of New York is reprinted in the Appendix at page 190. The oral opinion of the United States District Court for the Eastern District of New York, stated on the record in open court, dated August 7, 1984, is reprinted in the Appendix at page 192.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered June 8, 1987. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1). This petition has been filed within the time allowed by law.

STATUTES

42 U.S.C. § 1988 provides:

> ... In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Fed. R. Civ. P. 11 provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount

> of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

(1)

Stockholders and officers of Eastway Construction Corporation had been principals in limited partnerships that participated in the New York City Municipal Loan Program. Between 1966 and 1974, the City loaned the partnerships almost 12 million dollars to enable them to rehabilitate 34 buildings in depressed areas. (A148-149)[1]. These were largely non-recourse loans secured by mortgages on the buildings. By 1981, the

---

[1] References preceded by "A" are references to the Appendix to this Petition. References preceded by "CA" are references to the joint appendix filed in the Court of Appeals during the second appeal of this case which resulted in the most recent Court of Appeals decision.

loans were almost 8 million dollars in arrears and by 1983, all but 3 of the 34 buildings had reverted to City ownership. Furthermore, one of the plaintiffs, George Jaffee, Eastway's president, admitted to making illegal payments to a City official to expedite certain loans. (A149-A150).

Subsequently, the City decided that it would not enter into contracts with firms whose principals had controlled entities that had defaulted on City loans, and that the City would not approve such firms as contractors on private projects where City approval of contractors was required. (A150-A151). Since Eastway had specialized in working on publicly-financed housing rehabilitation projects in New York City, these policies significantly curtailed Eastway's business. (A151). Eastway challenged these policies in a state proceeding and lost. Eastway Construction

Corp. v. Gliedman, 86 A.D.2d 575, 446 N.Y.S.2d 306 (1st Dept. 1982), appeal withdrawn or discontinued, 58 N.Y.2d 972, no other citation (1983). (A151-A154).

(2)

Eastway again challenged the City's policy against it by commencing an action in federal court on February 3, 1984. Respondents sued the City, several City officials, the Community Preservation Corporation ("CPC"), CPC's president, Chemical Bank, and fifty unidentified "John Does". (A157). CPC is a nonprofit corporation which was founded by 39 banks for the purpose of lending money to private parties in order to enable them to rehabilitate residential buildings in depressed areas. In 1979 and again in 1981, CPC denied loans for the rehabilitation of a building in which George Jaffee, Eastway's

president, had an indirect interest. (A154-A156).

Respondents' complaint alleged that the City's policy of not doing business with Eastway or its principals violated their constitutional rights and that the City, CPC, and the other defendants had engaged in a conspiracy in violation of the Sherman Antitrust Act to drive Eastway out of the construction business. (A158). Petitioners and CPC moved for summary judgment dismissing the action. Petitioners admitted that the City had adopted a policy against dealing with Eastway, but denied that the City had induced others to refrain from dealing with Eastway. Petitioners also denied that the City's policy deprived Eastway of any property right or any other right protected by federal statute or the United States Constitution. CPC denied that it had engaged in a conspiracy with the

City; it asserted that its denials of the loans described above were based on the facts surrounding the projects in question and that it had no policy against lending money to projects connected with Eastway or its principals. (A159-A161). Petitioners and CPC requested attorney's fees on the grounds that respondents' action was frivolous. The District Court granted the motions to dismiss. The Court said that respondents had shown neither a civil rights nor an antitrust violation. The Court declined to grant the defendants' requests for attorney's fees, finding that the action was not frivolous. (A161-A162, A190-A198).

(3)

Respondents appealed the dismissal of their action and petitioners cross-appealed the denial of their motion for attorney's fees. CPC did not cross-appeal.

The Court of Appeals, after ruling that the District Court had properly dismissed respondents' civil rights and antitrust claims (A162-A175), addressed the attorney's fee issue raised by petitioners' cross-appeal.

The Court held that petitioners were entitled to attorney's fees from respondents under 42 U.S.C. § 1988 for the defense of the civil rights claim. The Court found that respondents' civil rights claim was unreasonable and groundless because respondents were unable to point to the deprivation of any right conferred by the United States Constitution or by federal statute. The Court said that Eastway's unsuccessful challenge to the City's policy in state court should have put respondents on notice that the City might receive attorney's fees if the City's policy was challenged again. (A177-A180).

The Court then held that the City was also entitled to attorney's fees under Fed. R. Civ. P. 11 for the defense of the antitrust claim. The Court said that Rule 11, as amended, required an attorney to conduct a reasonable inquiry into the validity of a complaint before signing it and it also required the imposition of sanctions where it appears that a complaint has been filed in bad faith, to harass a defendant, or where "after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." (A181-A187).

The Court said that although it could not say for certain that respondents or respondent law firm had acted in subjective bad faith in suing petitioners, nevertheless,

the antitrust action was doomed to failure because the City and CPC did not compete with Eastway and Eastway did not allege any anti-competitive effects. The Court also said that "a competent attorney, after reasonable inquiry, would have had to reach the same conclusion." Therefore, the Court held that the District Court erred in denying petitioners' motion for attorney's fees incurred in defending against the antitrust claim. The Court of Appeals remanded the case back to the District Court to determine the amount of attorney's fees that the City should receive and to determine whether the fees should be paid by respondents or respondent law firm or both. (A187-A189).

(4)

The proceedings on remand commenced with a conference before the District Court on June 27, 1985. (CA1e, CA3-CA8e). The

District Court stated that the Circuit Court's decision required it to assess full fees on both claims and it stated that it only had discretion to determine whether to assess fees against respondents or respondent law firm. (CA5-CA7). The District Court directed petitioners to submit their fee application. (CA8d-CA8e).

On July 25, 1985, petitioners filed a motion for attorney's fees in which they sought a "lodestar" amount of $43,925, from all respondents, jointly and severally. (CAle, CA9-CA104). The lodestar amount was arrived at by multiplying the number of hours each of three attorneys worked on the case by a reasonable market-based hourly rate for that attorney.

On October 16, 1986, respondents opposed petitioners' motion. (CA105-CA136). Respondents argued that the lodestar should be based on cost-based

hourly rates composed of salary and allocable overhead rather than market-based rates and also challenged as excessive and duplicative the number of hours requested by appellants. (CA107-CA110, CA119-CA136, CA327, CA328).

On October 17, 1985, the District Court requested briefs on, whether, in order to apportion the fee award, the court should conduct an inquiry into the nature of respondent law firm's preparation and beliefs; and what due process and attorney-client privilege questions would be raised by such an inquiry. (CA140-CA141). Both petitioners and respondents submitted responses to these inquiries.

In a letter dated January 7, 1986, petitioners responded to an inquiry of the District Court regarding whether it could award fees for legal work done in connection with the appeal before the Circuit Court and

in litigation of the fee award. (CA356-CA360). Petitioners included an updated fee request of $58,550. (CA360). Respondents opposed the awarding of fees for the appeal and litigation of the fee and they also argued that the District Court had discretion to award a fee below the lodestar. (CA361-CA365).

At oral argument on January 15, 1986, petitioners argued that, under existing case law, it would be improper for the Court to reduce the fee from the lodestar amount. (CA335-CA336). Respondent law firm represented to the Court that its clients, due to financial hardship, wished to pay any sanctions over two years. (CA345). Although the Court invited the submission of an affidavit demonstrating such hardship, none was submitted to the Court. (CA345, CA449).

The District Court issued a Memorandum and Order on May 23, 1986, awarding petitioners an attorney's fee of only $1,000.00. (A142). The District Court held that petitioners had demonstrated that they were entitled to a "lodestar" amount of $52,912.50 based on a reasonable hourly rate and a reasonable number of well-documented hours. (A108-A109). The Court arrived at this sum after excluding the time spent on the appeal and including the time spent litigating the amount of the fee. (A107-A108).

The District Court reduced the fee to $1,000.00 from the lodestar amount because of a number of factors. The Court said that it was reducing the amount because the action was only "marginally frivolous" (A111-A137), there was no evidence of subjective bad faith (A110), neither respondents nor their counsel had a history

of bringing frivolous cases (A136-A137), there was no evidence that the petitioners' attorneys were "unduly burdened" by the action (A138), and actions against the City involving commercial transactions should not be discouraged (A138-A140).

The District Court held that only respondents, and not respondent law firm should be liable for payment of the fee. The District Court said that it was doing so because the Circuit Court directed it to award attorney's fees against only the respondents for their civil rights claim under 42 U.S.C. § 1988 and to award fees against the respondents and/or respondent law firm for the antitrust claim under Rule 11; and that it would be difficult to determine how much time petitioners' attorneys spent on each claim. (A140-A142).

(5)

Petitioners appealed from the District Court's Memorandum and Order of May 23, 1986. On appeal, petitioners argued that the District Court erred in not assessing fees against respondent law firm, in not awarding fees for time spent on the prior appeal, and in reducing the fee below the lodestar. Petitioners argued that the award should not have been reduced below the lodestar because there was no evidence to show that awarding the lodestar amount would cause respondents or respondent law firm serious financial hardship, nor was there evidence to show that respondents or respondent law firm acted in such a manner as to demonstrate good faith when they commenced the action.

The Circuit Court decided the appeal on June 8, 1987. The majority of the Court held that the District Court erred insofar as

it reduced the lodestar amount below $10,000.00 and insofar as it did not assess fees against respondent law firm. The majority modified the District Court order to the extent of awarding petitioners' $10,000.00 and directing that $5,000.00 should be paid by respondents jointly and severally and $5,000 should be paid by respondent law firm. (A15-A16). The majority held that, when a defendant is entitled to an attorney's fee under 42 U.S.C. § 1988 or Fed. R. Civ. P. 11, the court awarding the fee need not use the lodestar method (which is used for determining the fee to be awarded to a prevailing plaintiff under 42 U.S.C. § 1988), but may exercise its discretion to award a fee which is a fraction of the lodestar. (A6-A10). The majority also said that while a district court has broad discretion in determining the size of the fee to be

awarded, the District Court in this case erred insofar as it awarded a fee of less than $10,000.00. (A10-A12). However, the majority did not articulate the nature of the District Court's error. Thus, the majority said:

> In this case, Chief Judge Weinstein has thoughtfully considered a variety of factors bearing on the appropriate amount of a fee to be awarded as a sanction. Without necessarily endorsing the pertinence of each factor, we agree with his general conclusion that a fee substantially less than the lodestar amount is permissible. However, discharging our responsibilities to monitor the outer limits of discretion in such matters, we have concluded that the bottom of the range of discretion appropriate to this case is a fee of $10,000. We therefore conclude that the $1,000 awarded by the District Judge must be revised upwards to the lowest point of permissible discretion.

(A11-A12).

As to who was to pay the fee, the majority said that, in its earlier decision, the Circuit Court had held that respondent

law firm was liable for fees under Fed. R. Civ. P. 11 for both the antitrust and civil rights claims. (A13). To expedite matters, the majority allocated liability for the fee award, rather than remanding the case to the District Court for that purpose, and ordered that half of the fee should be paid by respondents and half should be paid by respondent law firm. (A13-A15).

The dissent stated that the petitioners should have received the full lodestar amount of $52,912.50 unless it could be shown, on further remand, that the respondents or respondent law firm were financially unable to pay the full amount. (A25-A26).

The dissent said that absent proof of an inability to pay, or other, unusual circumstances, an attorney's fee awarded to a defendant under 42 U.S.C. § 1988 or Fed. R. Civ. P. 11 should be computed by using the same method that is used when a fee is

awarded to a prevailing plaintiff under 42 U.S.C. § 1988, i.e., the lodestar method. (A18-A19). The dissent said:

> The phrase "a reasonable attorney's fee" in rule 11 should be interpreted in the same manner as the same phrase in section 1988. While it is true that the policy underlying section 1988 is to encourage meritorious civil rights litigation, and that rule 11 was designed to discourage improper litigation in general, this difference in goals does not suggest that "a reasonable attorney's fee" should be calculated differently under the two provisions. Both provisions allow an attorney's fee as an enforcement tool for attaining their respective goals, and both provisions seek to shift to the party or attorney whose conduct imposed the financial burden the cost of an attorney's fee that, ideally, would never have been incurred. This fee-shifting tool, which is described in the two provisions in identical language, should not be disparately defined simply because the rules it promotes serve different policies. If the lodestar is the appropriate presumptive measure of "a reasonable attorney's fee" for section 1988, there is no reason it should not be in the rule 11 context as well. Moreover,

> because in the context of this case the attorney's fee is being awarded to prevailing defendants rather that prevailing plaintiffs, section 1988 and rule 11 here serve the same goal - the deterring of improper litigation.

(A23-A24).

REASONS FOR GRANTING THE WRIT

A majority of a panel of the United States Circuit Court for the Second Circuit held that, when a defendant is entitled to "a reasonable attorney's fee" under 42 U.S.C. § 1988 or Fed. R. Civ. P. 11, a District Court can award a fee which is a fraction of the lodestar fee even if there is no evidence that paying the lodestar amount would impose severe hardship on the payor of the fee. The majority held that, even after it has been determined that a party is entitled to a reasonable attorney's fee, the identity of the party is relevant when the fee is computed, and defendants, unlike plaintiffs, are not

entitled to full compensatory fees even if the plaintiff and his attorney can afford to pay full fees. The majority failed to explain why defendants should be subject to radically different treatment when reasonable attorney's fees are computed under 42 U.S.C. § 1988 and Fed. R. Civ. P. 11, and there is nothing in the legislative history or rulings of this Court which would support the notion that a different standard should be employed in determining the amount of attorney's fees that defendants are entitled to receive. Furthermore, the majority appears to be the only circuit court that has explicitly endorsed a double standard for computing fees, depending on the identity of the recipient. The holding of the majority below is directly contrary to recent decisions of the Fourth Circuit, the Seventh Circuit, and the Second Circuit itself, all of which have said that, when an action is frivolous

and a defendant is entitled to an attorney's fee, and the plaintiff can afford to pay, the congressional goal of deterring frivolous actions requires that a full fee be awarded. Furthermore, the majority's opinion is contrary to the general principle that a recipient of an attorney's fee award should ordinarily receive the lodestar amount, which principle has been stated and applied by this Court in several recent cases. Finally, the opinion of the majority creates confusion and uncertainty, and invites extensive satellite litigation over what constitutes a reasonable attorney's fee.

1. The decision of the majority is in direct conflict with decisions of two other Circuit Courts and a prior decision of the Second Circuit.

The District Court found that the lodestar amount of $52,912.50 reflected the value of the work done by petitioners' attorneys on

this case and this figure reflected a reasonable hourly rate multiplied by a reasonable number of well-documented hours. Nonetheless, the District Court awarded petitioners an attorney's fee of only $1,000.00. On appeal, the majority of the Circuit Court stated the District Court abused its discretion insofar as it awarded petitioners less than $10,000.00. In doing so the majority stated that a court can award a defendant who is entitled to an attorney's fee, a fee which is a fraction of the lodestar and the majority did not explain why a fractional award was appropriate here.

Insofar as the Circuit Court held that a defendant who is entitled to an attorney's fee is not entitled to a full fee absent evidence that the plaintiff is unable to pay a full fee award, or some other compelling reason, such holding is directly contrary to

the law as it has been stated by three Circuit Courts, including the Second Circuit.

In Munson v. Friske, 754 F.2d 683 (7th Cir. 1985), the Seventh Circuit upheld an attorney's fee award of $42,095 under 42 U.S.C. § 1988, imposed against a former public employee who had brought a frivolous action alleging several civil rights claims in which he alleged that his employment was wrongfully terminated. The Court held that the fee was appropriate because the plaintiff had the financial ability to pay the fee. Id. at 697-698. In so holding, the Court said: "When a court determines that a plaintiff can afford to pay the award, the congressional goal of discouraging frivolous litigation demands that full fees be levied." Id. at 697.

In Arnold v. Burger King Corp., 719 F.2d 63 (4th Cir. 1983), cert. denied, 469 U.S. 826 (1983), the plaintiff had brought a

frivolous action against his former employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., alleging that his employment had been terminated because of his race. At trial, the District Court dismissed the action after the defendants presented their evidence. The District Court found that the action was frivolous and awarded the defendants a total of $10,744.00 in attorney's fees pursuant to Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k). Id. at 64. On appeal the Fourth Circuit affirmed the fee award. The Circuit Court said that the District Court did not abuse its discretion in awarding defendants full attorney's fees because:

> The trial court found that Arnold was gainfully employed and apparently able to pay the fee award on such reasonable terms as might be arranged, and that the fee award was the reasonable value of the attorneys' services.

Id. at 69. In the course of reaching its conclusion, the Fourth Circuit said:

> When the plaintiff can afford to pay, however, the congressional goal of discouraging frivolous suits weighs heavily in favor of levying the full fees.

Id. at 68 (citation omitted).

In Faraci v. Hickey - Freeman Co., 607 F.2d 1025 (2d Cir. 1979), the plaintiff had brought a frivolous action against his former employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., alleging that his former employer had terminated him because of his national origin. Id. at 1027. The District Court dismissed the action, held that it was frivolous, and held that the defendants were entitled to attorney's fees under Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k). The defendants claimed that the reasonable value of their lawyers' services was $11,500.00,

but they requested $2,500.00 in light of the plaintiff's limited resources and the District Court awarded them this amount. Id.

On appeal, the Second Circuit said, "Where the plaintiff can afford to pay, of course, the congressional goal of discouraging frivolous litigation demands that full fees be levied." Id. at 1028. It then reduced the fee award to $200 because of the plaintiff's near-destitute financial condition and poor health. The plaintiff had proceeded pro se and in forma pauperis, and affidavits showed that his monthly income exceeded his basic monthly living expenses by only $63.00, and that he suffered from a serious heart ailment. Id at 1026, 1027, 1028, 1029.[2]

---

[2] Although the majority below cited Faraci for the proposition that it is permissible to award less than the lodestar when a (Footnote Continued)

In this case, there is no evidence that respondents or respondent law firm are unable to pay the full lodestar requested. The District Court invited respondents to present evidence of inability to pay, but no evidence was presented. Therefore, in this case, the Circuit Court's award of only 20% of the lodestar, without explanation[3], is in conflict with its decision in the Faraci case and with the decision of other circuits.

(Footnote Continued)
defendant is entitled to a reasonable attorney's fee, it did not state that a reduced fee was awarded in Faraci because of a factor which is not present here, the plaintiff's reduced financial cicumstances.

[3] While the District Court gave many reasons for awarding petitioners only $1,000, the Circuit Court majority held that the District Court was wrong by a factor of 10. However the majority did not explain in what manner the District Court erred, nor did it explain why $10,000 was preferable to $1,000 or $50,000.

2. The decision of the majority is in conflict with those decisions of this Court which have repeatedly underscored the importance of the lodestar in computing attorney's fees.

The majority awarded petitioners only 20% of the lodestar without explanation. In so doing, the majority implicitly held that the lodestar is of little importance when an attorney's fee is awarded. This holding is inconsistent with the decisions of this Court which have emphasized the importance of the lodestar in awarding an attorney's fee.

In Hensley v. Eckerhart, 461 U.S. 424 (1983), this Court set standards which "are generally applicable in all cases in which Congress has authorized an award of fees to a prevailing party." Id. at 433, n.7. In particular, the court held when a plaintiff is entitled to an attorney's fee under 42 U.S.C. § 1988, the amount of the fee should have some relationship to the extent of the

plaintiff's success, and the plaintiff should generally not receive full attorney's fees if success was only partial. Id. at 435-436, 438-440. In arriving at this holding, the Court mentioned the importance of the "lodestar" as a starting point for calculating a "reasonable attorney's fee." Thus, the Court said:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services.

Id. at 433.

In Blum v. Stenson, 465 U.S. 886 (1984), this Court held that, when a plaintiff is entitled to an attorney's fee under 42 U.S.C. § 1988, the fee computation should be based on a market-based hourly rate rather than a cost-based hourly rate even if the plaintiff is represented by a

nonprofit legal services organization rather than a private law firm. Id. at 894-896. The Court also held that, in some cases of exceptional success, a fee award above the lodestar figure may be justified, but the upward adjustment of the fee in the case before it was not justified. Id. at 897, 901-902. In the course of its opinion, the Court cited Hensley, supra, several times and reiterated the importance of the lodestar in arriving at "a reasonable attorney's fee." Id. at 897, 899, 900, 901. In particular, the Court noted that the lodestar will normally incorporate several factors relevant to the fee calculation. Thus, the Court said that the novelty and complexity of the case will normally be reflected in the hourly rate and number of hours requested. If a case is extremely novel and complex it will require special expertise, justifying a higher

hourly rate, and many hours of work. Id. at 898-899.

In Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, ___ U.S. ____, 106 S. Ct. 3088 (1986), the Court discussed the proper computation of a reasonable attorney's fee to a prevailing plaintiff who was entitled to attorney's fees under Section 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d). In the course of its opinion, the Court again emphasized the importance of the lodestar in computing "a reasonable attorney's fee," id. at 3097-3098, and said that the lodestar figure, the product of a reasonable number of hours times a reasonable rate, is presumptively a reasonable attorney's fee, absent extraordinary circumstances, and that the lodestar figure includes most of the relevant factors comprising a reasonable attorney's fee. Id. at 3098.

Although the foregoing cases involved fee awards to plaintiffs, we respectfully submit that, as the dissent below stated, there is no reason to compute a reasonable attorney's fee differently when the fee is being awarded to a defendant. Thus, in Prate v. Freedman, 583 F.2d 42 (2d Cir. 1978), the Second Circuit, determining that the plaintiffs' action was frivolous, and that defendants were entitled to attorney's fees under 42 U.S.C. § 2000e-5(k), remanded the case to the District Court with directions to award a reasonable attorney's fee and employ Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) as a guide for the computation of the fee, although Johnson involved an award of attorney's fees to prevailing plaintiffs. See also, Jones v. Dealers Tractor and Equipment Co., 634 F.2d 180, 182 (5th Cir. 1981); Faraci v. Hickey-Freeman Co., supra, 607 F.2d at

1028; Nash v. Reedel, 86 F.R.D. 16, 18 (E.D. Pa. 1980).

When fees are awarded to plaintiffs, they serve to encourage persons to protect certain rights or certain societal interests and to reimburse the costs of such protection. When awarded to defendants, fees serve to discourage frivolous litigation which clogs the courts, and to compensate those who have been burdened by such litigation. See, In re Cosmopolitan Aviation Corp., 763 F.2d 507, 517 (2d Cir. 1985), cert. denied sub nom, Rothman v. New York State Dept. of Transp., ___ U.S. ___, 106 S. Ct. 593 (1985); Faraci v. Hickey Freeman Co., supra, 607 F.2d at 1028; Taylor v. Prudential-Bache Securities, Inc., 594 F. Supp. 226, 229 (N.D.N.Y. 1984), aff'd mem., 751 F.2d 371 (2d Cir. 1984); Patterson v. Aiken, 111 F.R.D. 354, 356-357 (N.D. Ga. 1986); Index Fund, Inc. v.

Hagopian, 107 F.R.D. 95, 99 (S.D.N.Y. 1985). Therefore, since the award of fees to defendants serves important purposes, just as the award of fees to plaintiffs does, there is no reason to treat these two kinds of fee awards differently when they are computed. Consequently, the decision of the majority below is in conflict with principles stated and applied by this Court in several recent cases.

3. The decision of the majority will create uncertainty, confusion, and a proliferation of satellite litigation whenever a party is entitled to an award of a "reasonable attorney's fee."

Many statutes permit a court to award a prevailing party a "reasonable attorney's fee." E.g., 7 U.S.C §2565 (Plant Variety Protection Act of 1970); 15 U.S.C. §77k(e) (Securities Exchange Act of 1934); 17 U.S.C. §505 (Copyright Act of 1976); 29 U.S.C. §1132(g)(1) (Employee Retirement

Income Security Act of 1974); 33 U.S.C. §1415(g)(4) (Marine Protection, Research, and Sanctuaries Act of 1972); 42 U.S.C. §1973(l)(e) (Voting Rights Act Amendments of 1973); 42 U.S.C. §1988 (Civil Rights Attorney's Fees Act of 1976); 42 U.S.C. §2000e-5(k) (Civil Rights Act of 1964); 42 U.S.C. §7604(d) (Clean Air Amendments of 1970). In addition, several rules of the Federal Rules of Civil Procedure provide for the imposition of a reasonable attorney fee as a sanction when a particular rule has been violated. E.g., Rule 11, Rule 16(f), Rule 26(g), Rule 37(b)(2)(E).

A court must exercise its discretion carefully before deciding whether a party should be forced to pay its adversary's attorney's fee. In some cases, the result may depend on the identity of the party and the nature of the case. Thus for example in civil right cases, a plaintiff is usually

awarded fees merely for winning the action, even if the defense was well-grounded, while the defendant will be awarded fees only if the action is frivolous. See, Hensley v. Eckerhart, supra, 461 U.S. at 430 & 430, n.2. Where an attorney's fee is sought for a violation of a Federal Rule of Civil Procedure, a court must decide first, whether a violation has occurred and a sanction is therefore required, and second, whether an award of attorney's fees is the proper sanction.

In any context in which a court decides whether to award an attorney's fee, it must necessarily consider a variety of factors and exercise broad discretion. However, we respectfully submit that, as the dissent below stated, once it has been determined that a party is to receive a "reasonable attorney's fee," the scope of discretion is narrowed and the court should award the

lodestar unless such an award would be financially crushing to the other party or other extraordinary circumstances preclude such an award.

As noted above, this Court has already stated that, where a plaintiff is entitled to an award of fees as a prevailing party, the lodestar is presumptively the proper fee. It has also been noted above that three circuit courts have stated that, when a defendant is entitled to attorney's fees as a prevailing party, the defendant should receive full fees when the plaintiff can afford such fees. Nonetheless, the majority below has held that when the recipient of a fee is a prevailing defendant, or any party who receives an award of fees as a sanction under the Federal Rules of Civil Procedure, the amount of the fee is not presumptively the lodestar, or any particular figure. Rather, the majority states, that under such

circumstances, a court must exercise its discretion in some undefined way and may award a figure which is a fraction of the lodestar.

Although there may be valid reasons for having different standards for the award of attorney's fees, depending upon who is to receive them and in what procedural context the fees are to be awarded, there is no valid reason for computing attorney's fees differently after it has been determined that a party is entitled to an award of an attorney's fee. Furthermore, the approach of the majority below is illogical and confusing. As the dissent below points out, an award which bears no relationship to the lodestar is not a "reasonable attorney's fee", it is an arbitrary fine.

If the position of the majority below is followed, there will never be any way for the parties or district court to ascertain with

any degree of the certainty what amount the district court should award after it has decided than an award of a reasonable attorney's fee is appropriate. The award of an attorney's fees will always be an ad hoc determination subject to ad hoc appellate review. This is exemplified by the recent case of Johnson v. NYCTA, ___ F.2d ___, Docket No. 86-7406 (2d Cir. July 9, 1987), in which the Second Circuit, relying on its most recent Eastway decision, remanded a case for the recalculation of an attorney's fee award without giving the District Court any standards for the recalculation.

Theodore Johnson was employed by the New York City Transit Authority ("NYCTA") from February 16, 1971 through August, 1983. During his employment he was a member of the Transport Workers Union, Local 100 ("TWU"). Johnson v. NYCTA, 639 F. Supp. 887 (S.D.N.Y. 1986). Shortly

after being hired, Johnson commenced a series of judicial and administrative proceedings against the NYCTA and the TWU. Id. at 888-890, 894, 896-896. Johnson's litigation culminated in two actions in federal district court. The District Court dismissed these two actions. Id. at 892, 893, 895. The District Court further held that, because Johnson's actions were frivolous, the defendants were entitled to an attorney's fee under 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k) and that sanctions should be imposed against his counsel pursuant to Fed. R. Civ. P. 11. Id. at 896.

After subsequent proceedings, the District Court awarded the NYCTA $250.00 in costs and it awarded the TWU $32.50 in costs and $6900.00 in attorney's fees; and it ordered Johnson and his counsel to each pay half of these amounts. Johnson v. NYCTA,

____ F. Supp. __, Nos. 83 Civ. 1352, 85 Civ. 0629 (E.D.N.Y. August 5, 1986), sl. op. at 8. The District Court disallowed $6,575.00 in fees requested by the NYCTA and $2038.75 in fees requested by the TWU because no contemporaneous time records were available to support these fees. Id., sl. op. at 7-8. Before making its award, the District Court considered and rejected several arguments Johnson made to induce the District Court to award no fee or a reduced fee. Id., sl. op. at 2-7.

On appeal, the Second Circuit reversed and remanded the case for a redetermination of the fee award. Johnson v. NYCTA, ____ F.2d ____, No. 86-7406 (2d Cir. July 9, 1987). The Circuit Court held that a reconsideration of the amount of the fee award against Johnson was required because it was not clear whether the District Court merely assessed Johnson one half of the

lodestar or whether it exercised its discretion as required by the most recent Eastway decision. The Circuit Court decision does not suggest that Johnson presented evidence of difficult financial circumstances. Furthermore the Circuit Court said that "$3,450 is not necessarily an excessive award under the circumstances." Nonetheless, it remanded the case to the District Court for a reconsideration of the award and directed it to consider Johnsons' ability to pay $3,450 as well as other unspecified "mitigating factors."

The Johnson case shows that the most recent Eastway decision will create endless confusion and uncertainty because, under Eastway, it is impossible to estimate what a reasonable attorney's fee will be in any given case until a particular District Court judge exercises his or her discretion and

that exercise of discretion is affirmed by a Circuit Court.

Furthermore, the majority opinion below invites endless satellite litigation, when attorneys fees are awarded. Johnson makes it clear that, under Eastway, a district court must first, examine the merits of a case, and second, decide whether to award an attorney's fee, and then, rather than use the relatively simple and well-established lodestar method, it must engage in a far-reaching analysis in order to properly exercise its discretion before arriving at some figure which may bear no relation to the cost of representation actually incurred by the party receiving the attorney's fee. As result, the compensatory purposes of awarding an attorneys fee will be defeated, and in addition, the benefits of reducing frivolous litigation will be offset by the length and complexity of litigating the

attorney's fee. See, Fed. R. Civ. P. 11, Advisory Committee Notes. Contrary to the admonition of this Court in Hensley v. Eckerhart, supra, 461 U.S. at 438, "[a] request for attorney's fees [will] result in a second major litigation."

In Hensley and its progeny, this Court has provided litigants, their counsel, and the judiciary with a clear and relatively simple method for computing a "reasonable attorney's fee." It is not a very complicated matter to determine the proper hourly rate and number of hours for the calculation of the lodestar; it can usually be done on papers. Then, absent unusual circumstances, simple multiplication will provide the proper fee. However, the majority below, in discarding this well-settled and easy to follow body of law, forces the courts into an uncharted area where the phrase "reasonable attorney's fee," which appears in many

statutes, has no settled meaning, and must be defined anew for each case after a court has taken evidence on and considered a host of unnamed "mitigating factors."

Therefore, the decision of the majority below, if allowed to stand; will create confusion, uncertainty, and excessive satellite litigation whenever attorney's fees are awarded.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

PETER L. ZIMROTH,
Corporation Counsel of
the City of New York,
Attorney for Petitioners.

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
JOHN P. WOODS,
FRED KOLIKOFF,
of Counsel.

*Counsel of Record

August 28, 1987

87-359 No. 87-

Supreme Court, U.S.
FILED
AUG 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE CITY OF NEW YORK, et al.,

Petitioners,

-against-

EASTWAY CONSTRUCTION CORP., et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETER L. ZIMROTH,
Corporation Counsel of the
City of New York,
Attorney for Petitioners,
100 Church Street,
New York, N.Y. 10007.
(212) 566-4328 or 4338

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
JOHN P. WOODS,
FRED KOLIKOFF,
of Counsel.

*Counsel of Record

August 28, 1987

TABLE OF CONTENTS

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JUNE 8, 1987 1

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED MAY 23, 1986 28

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED, MAY 21, 1985 144

AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED, DECEMBER 29, 1984 190

ORAL DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED AUGUST 7, 1984 192

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JUNE 8, 1987

EASTWAY CONSTRUCTION CORP., GEORGE JAFFEE, IRVING H. KANAREK, and ROBERT JACOBS,

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK, NATHAN LEVENTHAL, individually and as Deputy Mayor of the City of New York, ANTHONY G. GLIEDMAN, individually and as Commissioner of the New York City Department of Housing Preservation and Development, CHARLES REISS, individually and as Deputy Commissioner of the New York City Office of Development,

Defendants-Appellants,

-and-

THE COMMUNITY PRESERVATION CORPORATION, MICHAEL LAPPIN, individually and as President of the Community Preservation Corporation, JOHN DOES one through fifty, and CHEMICAL BANK, N.A.,

Defendants.

Before: KAUFMAN, NEWMAN, and PRATT, Circuit Judges.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Appeal from an order of the District Court for the Eastern District of New York (Jack B. Weinstein, Chief Judge), after a remand from this Court, 762 F.2d 243, assessing an attorney's fee against the plaintiff in the amount of $1,000.

Modified and remanded. Judge Pratt dissents with a separate opinion.

Fred Kolikoff, New York, N.Y. (Frederick A.O. Schwarz, Jr., Corp. Counsel, Edward F.X. Hart, John P. Woods, New York, N.Y., on the brief), for defendants-appellants.

James M. LaRossa, New York, N.Y. (John W. Mitchell, Karen F. Silverman, LaRossa, Mitchell & Ross, New York, N.Y., on the brief), for plaintiffs-appellees.

JON O. NEWMAN, Circuit Judge:

In Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) ("Eastway I"), a panel of this Court determined that the prevailing municipal defendants should receive an award of "a reasonable attorney's fee" and remanded the

case for the determination of the appropriate amount. On remand, Chief Judge Weinstein concluded that, although the lodestar amount of a fee based on the hours reasonably expended by defendants' counsel and the market rate for their services was $52,912.50, the fee to the awarded would be $1,000. 637 F. Supp. 558 (E.D.N.Y. 1986). We have concluded that the award falls below even the range within which a district judge may exercise his considerable discretion in such matters, and we therefore modify the award to the amount at the lower limit of the range appropriate for this case, $10,000.

The circumstances of the litigation are fully set forth in our prior opinion and the opinion of the District Court on remand. Suffice it to recount here only that the litigation involved a civil rights claim and an antitrust claim, both of which were determined in Eastway I to be frivolous,

thereby creating liability for an award of a reasonable attorney's fee to the municipal defendants under both 42 U.S.C. § 1988 (1982) and Rule 11 of the Federal Rules of Civil Procedure. The defendants have returned to this Court with two objections to the fee award made by the District Court. First, they contend that it was an abuse of discretion to award anything less than the full lodestar amount. Second, they urge that the appropriate award, in whatever amount, should not have been imposed solely on the plaintiffs but should have been imposed upon their counsel and perhaps also upon the plaintiffs.

1. The Amount of the Fee Award

We recognized in Eastway I that "the district courts retain broad discretion in fashioning sanctions, and apportioning fees between attorney and client." 762 F.2d at

254 n.7. The "specifics" of an attorney's fee award, we observed, would be reviewed under an "'abuse of discretion' standard." Id.

It is arguable that the discretion of district judges under Rule 11 should focus primarily if not exclusively upon the choice of sanctions that might be selected after a court has determined that the Rule has been violated. Under this view, once the sanction of a reasonable attorney's fee has been chosen, the amount of that fee should be determined by the lodestar method, now commonly used in determining a reasonable fee appropriate for a prevailing plaintiff under section 1988. The opposing view proceeds from the fact that an award of attorney's fees to a prevailing defendant, under either section 1988 or Rule 11, serves not only as compensation for the defendant but also as a sanction against the plaintiff

and, sometimes under Rule 11, against his attorney. It is of the essence of decision-making with regard to sanctions that their severity be carefully calibrated by those entrusted with the responsibility for imposing them. Though some discretion is always exercised in selecting from among the sanctions available under Rule 11, use of the lodestar amount whenever a court elects to award a defendant an attorney's fee might lead some judges to impose an excessive sanction upon some plaintiffs and might inhibit other judges from ever selecting an attorney's fee as the appropriate sanction.

Each of these opposing views has force, and, were the slate clean, we would have to assess them with some care. Indeed, one member of the panel, Judge Pratt, holds the view that an attorney's fee, whenever awarded to a prevailing defendant, should normally be the lodestar amount. But a

majority of the panel is persuaded that however we might weigh the competing considerations were we formulating Rule 11, the course of the law concerning use of attorney's fees as one of an array of sanctions against frivolous litigation has recognized that a lodestar amount need not be routinely awarded.

In Faraci v. Hickey-Freeman Co., 607 F.2d 1025 (2d Cir. 1979), we applied a flexible approach to a defendant's fee award under the fee-shifting provision of Title VII, 42 U.S.C. § 2000e-5(k), a provision we have construed to authorize a defendant's fee award where the plaintiff's claim is frivolous. Carrion v. Yeshiva University, 535 F.2d 722, 727 (2d Cir. 1976). See Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421 (1978). The standards for awarding fees to prevailing defendants under Title VII and section 1988 are the same. Hughes

v.Rowe, 449 U.S. 5, 14 (1980). In Faraci, the defendant's legal fees amounted to $11,500. The District Judge exercised his discretion to allow only $2,500. On appeal, we concluded that under all the circumstances a fee award of only $200 was appropriate. See also Carrion v. Yeshiva University, supra, 535 F.2d at 728 (defendant "certainly not made whole" by fee award of $5,000). We have also awarded prevailing defendants less than the lodestar amount of a legal fee in exercising our authority under Rule 38 of the Federal Rules of Appellate Procedure in determining what amount of legal fees are to be awarded as a sanction for a frivolous appeal. See, e.g., United States v. Potamkin Cadillac Corp., 697 F.2d 491, 495 (2d Cir.) (double costs plus $500 attorney's fee), cert. denied, 462 U.S. 1144 (1983); In re Hartford Textile Corp., 659 F.2d 299, 306 (2d Cir. 1981)

(double costs plus $5,000 attorney's fee), cert. denied, 455 U.S. 1018 (1982).

The case law under Rule 11 also reflects the exercise of discretion to award only that portion of a defendant's attorney's fee thought reasonable to serve the sanctioning purpose of the Rule. E.g., Nixon v. Individual Head of St. Joseph Mortgage Co. Inc., 612 F. Supp. 253, 256 (N.D. Ind. 1985) ($250 for each of defendants' two attorneys), aff'd, 787 F.2d 595 (7th Cir. 1986); Fox v. Boucher, 603 F. Supp. 216, 220 (S.D.N.Y. 1985) ($3,000), aff'd, 794 F.2d 34 (2d Cir. 1986); Index Fund v. Hagopian, 107 F.R.D. 95, 99 (S.D.N.Y. 1985) ($100); Weisman v. Rivlin, 598 F. Supp. 724, 726-27 (D.D.C. 1984) ($200); Heimbaugh v. City of San Francisco, 591 F. Supp. 1573, 1277 (N.D. Cal. 1984) ($50). See also S.M. Kassin, An Empirical Study of Rule 11 Sanctions 6, n.20, and

accompanying text (Federal Judicial Center 1985) (reporting 65 cases in which "some portion" of defendant's attorney's fees has been awarded under Rule 11). Fees far below the lodestar amount have frequently been awarded to prevailing defendants under section 1988. E.g., Kostiuk v. Town of Riverhead, 570 F. Supp. 603, 612-13 n.4 (E.D.N.Y. 1983) ($250).

To recognize that district judges have discretion in determining the amount of a defendant's fee that would be reasonable to serve as a sanction is not, however, to forgo traditional appellate review of the exercise of such discretion. All discretion is to be exercised within reasonable limits. The concept of discretion implies that a decision is lawful at any point within the outer limits of the range of choices appropriate to the issue at hand; at the same time, a decision outside those limits

exceeds or, as it is infelicitously said, "abuses" allowable discretion. See Stormy Clime Ltd. v. ProGroup, Inc., 809 F.2d 971, 974 (2d Cir. 1987); Friendly, Indiscretion About Discretion, 31 Emory L. Rev. 747, 773-78 (1982).

In this case, Chief Judge Weinstein has thoughtfully considered a variety of factors bearing on the appropriate amount of a fee to be awarded as a sanction. Without necessarily endorsing the pertinence of each factor, we agree with his general conclusion that a fee substantially less than the lodestar amount is permissible. However, discharging our responsibilities to monitor the outer limits of discretion in such matters, we have concluded that the bottom of the range of discretion appropriate to this case is a fee of $10,000. We therefore, conclude that the $1,000 awarded by the

District Judge must be revised upwards to the lowest point of permissible discretion.

2. Allocation of the Fee Award

Section 1988 contemplates fee shifting between parties and makes no provision for imposing upon plaintiff's counsel the burden of fees awarded to a prevailing defendant. See Davidson v. Allis-Chalmers Corp., 567 F. Supp 1532, 1537-38 (W.D. Mo. 1983). Rule 11, on the other hand, authorizes assessment of a fee against counsel, a party, or both. Upon remand in this case, Chief Judge Weinstein understood Eastway I to authorize a fee award to the defendant under Rule 11 only with respect to the defense of the antitrust claim, with a fee award under section 1988 for defense of the civil rights claim. In order to allocate the burden of a fee award between the plaintiffs and their counsel, that understanding of Eastway I

would have required an initial allocation of the fee according to the time spent defending each claim. The difficulty of making that initial allocation, a difficulty acknowledged by the municipal defendants, persuaded Chief Judge Weinstein "in the interests of efficiency, fairness and policy" to forgo any allocation and impose the fee award solely against the plaintiffs. 637 F. Supp. at 584.

Though some language in Eastway I appears to limit the Rule 11 discussion to the antitrust claim, we believe the opinion, read as a whole, authorizes a fee award under Rule 11 with respect to both the civil rights and the antitrust claims. It is therefore unnecessary to allocate the time of defendants' counsel between the two claims. What remains is allocation of the revised fee award of $10,000 between plaintiffs and their counsel. Normally that is a task within the

discretion of a district court. There are occasions, however, where reviewing courts resolve issues normally decided by lower courts in order to bring protracted litigation to a close. See, e.g., Concolo v. Federal Maritime Commission, 383 U.S. 607, 621 (1966); O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951); Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 516 F.2d 172, 186-87 (2d Cir. 1975), rev'd on other grounds, 430 U.S. 1 (1977); Georgia-Pacific Corp. v. U.S. Plywood-Champion Papers, Inc., 446 F.2d 295, 299 (2d Cir.), cert. denied, 404 U.S. 870 (1971). This is simply an exercise of an appellate court's authority to "direct the entry of such appropriate judgment . . . as may be just under the circumstances." 28 U.S.C. §2106 (1982). It is also what Holmes called, in a related context, a "concession to

the shortness of life." Reeve v. Dennett, 145 Mass. 23, 28, 11 N.E. 938, 944 (1887).

We deem it appropriate to resolve the allocation issue. Having examined the parties' contentions, the prior proceedings, and the observations of the District Judge, we have concluded that one half of the fee award should be imposed jointly and severally upon the plaintiffs and one half should be imposed upon plaintiffs' counsel. We also conclude that no other fees are to be awarded with respect to proceedings in either the District Court or this Court, and no appellate costs are to be awarded with respect to this appeal. In short, upon the entry of a judgment in conformity to our mandate, this litigation is ended.

Accordingly, the order of the District Court is modified and the cause remanded with directions to enter an order awarding the municipal defendants legal fees of

$10,000, $5,000 imposed upon the plaintiffs jointly and severally and $5,000 imposed upon plaintiffs' counsel.

PRATT, Circuit Judge, dissenting:

As intimated in the majority opinion, I do not agree that the amount of "a reasonable attorney's fee" imposed as a sanction under rule 11 should be measured by the severity of an adversary's misconduct. While it is true, as Judge Newman states, we do not have a "clear slate" to write on, this case seemed to present a unique opportunity to wipe clean a slate that should be an embarrassment to all of us and to start building with amended rule 11 a logical, consistent rationale for the new "Era of Sanctions." We should end the misleading practice of justifying what are in reality punitive fines by pretending that they represent attorney's fees. Since I have been unable to persuade my colleagues at this time, however, I shall simply record my view of the problem for whatever use it may have in the future.

I recognize, as Judge Newman points out, that many courts, our own included, have over the years imposed sanctions of varying amounts under the rubric of "reasonable attorney's fees," but without any pretense at determining what compensation for the attorney of the wronged party would be reasonable. However tolerable that kind of approach may have been in former years when sanctions were relatively uncommon, I think it now not only disserves both the language and intent of amended rule 11, but also perpetuates disparities in sanctions, encourages arbitrariness in the day-to-day operations of some of our district courts, and runs counter to logic.

In reaching what is essentially a policy-based decision, the majority leans heavily on the punitive aspect of rule 11 sanctions and the need for judicial discretion in calibrating the severity of a penalty; in

doing so, however, the majority neglects the second purpose of rule 11: to provide restitution to the victim of the sanctioned conduct. It seems to me that when "a reasonable attorney's fee" is to be awarded as an appropriate sanction under rule 11, it should, in the absence of a special circumstance, such as an inability to pay that would make the award unjust, be objectively quantified following the standard approach -- the lodestsar method that has already been developed for determining "a reasonable attorney's fee" to a prevailing plaintiff under 42 U.S.C. §1988.

Amended rule 11 was intended to redress two related problems under its overarching goal of eliminating improper litigation tactics. See Schwarzer, Sanctions Under The New Federal Rule 11 - A Closer Look, 104 F.R.D. 181, 201 (1985). The first aim was to deter abusive litigants;

indeed, "[t]he word 'sanctions' in the caption * * * stresses a deterrent orientation in dealing with improper pleadings, motions or other papers." Fed. R. Civ. P. 11 advisory committee notes. Rule 11 sanctions are not, however, meant solely to deter those who would abuse our federal system of justice; they serve also to compensate the victims of that abuse. See Taylor v. Prudential-Bache Securities, Inc., 594 F. Supp. 226, 229 (N.D.N.Y.) (Miner, J.), aff'd mem., 751 F.2d 371 (2d Cir. 1984). This second aspect of rule 11 is clear from the advisory committee's recognition that the inclusion of a sanctioning power in amended rule 11 sought to "build[ ] upon and expand[ ] the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." Fed. R. Civ. P. 11 advisory

committee notes (emphasis added); see also Patterson v. Aiken, 111 F.R.D. 354, 356 (N.D. Ga. 1986).

In plain language, rule 11 establishes that an appropriate "sanction" and "a reasonable attorney's fee" are not synonymous, as the rule provides for "an appropriate sanction * * * which may include * * * a reasonable attorney's fee." Fed. R. Civ. P. 11 (emphasis added). Thus, congress intended to make available in the universe of sanctions an attorney's fee as but one example of a wide array of possible monetary and nonmonetary sanctions.

Some examples of nonmonetary sanctions might include requiring continuing legal education course work in areas of acute deficiency; in extreme cases, recommending disciplinary action by the bar; or something as simple as a judicial reprimand, whether rendered in private, in open court, or in a

published opinion. Should a district judge believe that a very modest monetary sanction is appropriate under the circumstances, she might, for example, award single, double, or triple costs. Given a different setting, the judge may deem it fitting to award full restitution for the misconduct, i.e., "a reasonable attorney's fee."

In addition, while not specifically mentioned in rule 11, the possibility exists that a sum of money unrelated to any such objective figure as expenses or an attorney's fee -- i.e., a penalty in the nature of a fine -- could be imposed. Should such a fine be deemed appropriate, the district judge also would have to determine whether the money should be paid into the registry of the court, see e.g., Dore v. Schultz, 582 F. Supp. 154, 158 (S.D.N.Y. 1984), or to the opposing party. Of course, the court would realize that while both options would punish

the offending party, only the latter option would also help to compensate the party harmed by the improper conduct.

The phrase "a reasonable attorney's fee" in rule 11 should be interpreted in the same manner as the same phrase in section 1988. While it is true that the policy underlying section 1988 is to encourage meritorious civil rights litigation, and that rule 11 was designed to discourage improper litigation in general, this difference in goals does not suggest that "a reasonable attorney's fee" should be calculated differently under the two provisions. Both provisions allow an attorney's fee as an enforcement tool for attaining their respective goals, and both provisions seek to shift to the party or attorney whose conduct imposed the financial burden the cost of an attorney's fee that, ideally, would never have been incurred. This feeshifting tool,

which is described in the two provisions in identical language, should not be disparately defined simply because the rules it promotes serve different policies. If the lodestar is the appropriate presumptive measure of "a reasonable attorney's fee" for section 1988, there is no reason it should not be in the rule 11 context as well. Moreover, because in the context of this case the attorney's fee is being awarded to prevailing defendants rather than prevailing plaintiffs, section 1988 and rule 11 here serve the same goal -- the deterring of improper litigation.

I recognize that accepting my view of rule 11 would mark a substantial departure from the past judicial practice of imposing sanctions in arbitrarily determined amounts verbally disguised as "attorney's fees," and I can't be sure that recognizing such sanctions for what they are -- fines -- would have changed the result in any of the

many cases cited in the majority opinion. I am confident, however, that if we were to interpret the statutory term "reasonable attorney's fees" to mean amounts that represent the reasonable cost of an attorney's services, we would begin to bring the full dimensions of the problem into the open; we would force district judges to actively consider other types of sanctions, including restitution and various nonmonetary impositions, and we would help reduce the apparent disparities, even capriciousness, that now seem to characterize much of rule 11 jurisprudence.

I therefore cannot agree with the majority opinion because if fails to require the rule 11 sanction of a "reasonable attorney's fee" to be calculated with reference to the actual cost burden on defendant that was inflicted by plaintiff's misconduct. To dispose of this appeal, I

would direct that the sanction award be increased from the $1,000 found by the district court to constitute "a reasonable attorney's fee" to the $52,912.50 established by the record to be a reasonable attorney's fee under the lodestar approach, and remand to the district court for the limited purposes of (1) apportioning the sanction between plaintiffs and their counsel and (2) determining whether the obligation of either should be adjusted for financial inability. To the extent that the majority opinion fails to do this, I dissent.

I agree with the majority that the district court erred in determining that "a reasonable attorney's fee" in this case is only $1,000; such a determination was arbitrary, capricious, and contrary to the intent of rule 11. I cannot, however, accept the $10,000 figure selected by the majority; while closer in dollar amount to a proper

sanction, it, too, does not constitute "a reasonable attorney's fee" under rule 11 and is therefore no less arbitrary in principle than the amount selected by the district court.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED MAY 23, 1986

EASTWAY CONSTRUCTION CORP., et al.

Plaintiffs,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

A P P E A R A N C E S :

LaRossa, Mitchell & Ross
41 Madison Avenue
New York, New York 10010

By: James LaRossa, Esq.
John Mitchell, Esq.

Attorneys for Plaintiffs

Frederick A.O. Schwarz, Jr., Esq.
Corporation Counsel of the City
of New York
100 Church Street
New York, New York 10007

By: John Woods, Esq.

Attorney for Defendants

WEINSTEIN, Ch. J.:

TABLE OF CONTENTS

I. Facts & Procedural History 32

II. Law 39
A. Purpose and Relationship of Rule 11 and 42 U.S.C. §1988 39
B. Role of the District Court 48
C. Issues in Imposing Rule 11 Sanctions 54
1. Objective and Subjective Standards 54
2. Due Process Right to a Hearing 60
3. Allocation of the Sanction Between the Attorney and the Client 66
4. Allocation of Rule 11 Sanctions by Cause of Action 73
5. Amount of the Sanctions 75
a. Expenditures of Party Seeking Sanctions - Lodestar Method and Market Rates 16
b. Mitigating Factors Leading to a Reduction of the Award 81
i. Subjective Factors - Generally 83
ii. Subjective Factors - Vindictiveness and Desire to Punish Opponent 84
iii. First Offenders and Others of Good Repute 86
iv. Ability to Pay 88

v. Need for Compensation 90
vi. Degree of Frivolousness 90
vii. The Importance of Not Discouraging Particular Types of Litigation 94
c. Award of Attorney's Fees for Time Spent on the Motion for Fees 96
d. Award of Attorney's Fees for Time Spent on Appeal 99
D. Awards of Attorney's Fees to Prevailing Defendants Under Section 1988 101

III. Law Applied to the Facts 104
A. Number of Compensable Hours and Allowable Maximum Hourly Rate 106
1. Time Spent on the Motion for Fees 107
2. Time Spent on the Appeal 107
3. Maximum Allowable Fee 108
B. Mitigating Factors 110
1. Subjective Factors 110
2. Frivolousness of the Complaint 111
a. The Antitrust Claim 111
b. The Due Process Claim 128
3. Need of Lawyer and Client for Punishment 136
4. Ability to Pay and Need for Compensation 137
5. Chilling This Type of Litigation 138

C. Allocation of Award of Attorney's Fees 140

IV. Conclusion 142

This matter was remanded for the awarding of attorney's fees under Rule 11 of the Federal Rules of Civil Procedure and 42 U.S.C. § 1988. Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) (Eastway I). For the reasons indicated below, a modest portion of defendant's attorney's fees is assessed against the plaintiffs, while no fees are assessed against plaintiffs' counsel.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Eastway Construction Corporation is a general contractor that during the 1960s and 1970s engaged exclusively in construction work on publicly financed housing rehabilitation projects in New York City. Plaintiffs Jaffee, Kanarek and Jacobs are officers of Eastway Construction Corporation. Collectively, plaintiffs are referred to in this opinion as

"Eastway." (A more extensive statement of the facts than is needed for this phase of the litigation is set forth in Eastway I.)

Between 1966 and 1974, defendant City of New York ("City"), loaned nearly twelve million dollars through a now defunct program to limited partnerships controlled by principals of Eastway Construction Corporation. The purpose of the loans was to enable the partnerships to rehabilitate thirty-four multiple dwelling buildings in depressed neighborhoods. The loans were generally non-recourse, secured only by mortgages on the buildings. The partnerships fell behind in their loan payments, so that by March 1983 all but three buildings had reverted to City ownership through default, and the remaining three buildings secured mortgage arrearages totaling about three million dollars.

In the early 1970s, the City's housing rehabilitation loan program was enveloped in corruption, with one City official being convicted of extortion and accepting bribes, and several developers being charged with fraud. George Jaffee admitted making payments to a city official in an attempt to expedite the processing of pending loan applications. No criminal charges were brought against him or Eastway Construction Corporation. In response to this scandal, New York State revised its public housing finance laws. One part of the new statutory scheme gave the City the power to regulate the creation and operation of certain housing redevelopment companies and to control the identities of firms with which these redevelopment companies did business.

In the exercise of its new powers, the City decided that it would no longer enter into rehabilitation contracts with firms whose

principals controlled entities that were in arrears or had defaulted on loans from the City. This policy prevented Eastway Construction Corporation from doing rehabilitation work directly for the City. In 1980 the City exercised its supervisory power over redevelopment companies and forbade them from entering into contracts with firms that the City refused to contract with. As a result Eastway was barred from doing any rehabilitation work for the City even indirectly.

Threatened with being forced out of business, Eastway went to the state court to challenge the City's policy, initiating an Article 78 proceeding that sought to have the policy declared "arbitrary and capricious." The state court challenge initially met with success, with the State Supreme Court granting summary judgment in Eastway's favor. On appeal, the

Appellate Division reversed, Eastway Construction Corp. v. Gliedman, 86 A.D.2d 575, 446 N.Y.S. 2d 306 (1st Dep. 1982). No appeal was perfected to the Court of Appeals because, according to Eastway, it was then in the midst of attempting to negotiate a "work out" agreement to settle its differences with the City. The negotiations did at one point produce a tentative agreement. The City, however, ultimately refused to execute the agreement, and it never became effective.

Another major actor in the New York City housing rehabilitation arena is the Community Preservation Corporation ("CPC"), a private consortium of thirty-nine banks that do business in the City. CPC extends low interest loans to private developers to facilitate the rehabilitation of multiple dwelling buildings in depressed neighborhoods. In June of 1978 and again

In July of 1981, Everett Jennings, on behalf or Orange Realty Co., applied to CPC for a loan to be used to rehabilitate a building in Brooklyn. Although Orange Realty was affiliated with Eastway, the loan applications did not list Eastway as general contractor. Both loan applications were rejected.

Unable to secure work on either publicly or privately financed housing rehabilitation projects, Eastway commenced the present action in this court. The complaint stated two causes of action under federal law. The first was an antitrust claim, which alleged that the City and CPC had conspired to prevent Eastway from carrying on its business. The second was, in essence, a due process claim, which alleged that the City's policy had deprived Eastway of its rights without due process of law.

The municipal and private defendants each moved for summary judgment, and each requested an award of attorney's fees. In August 1984 this court granted both summary judgment motions and dismissed the action but denied the motions for attorney's fees, stating on the record that it found plaintiffs' claims were not frivolous. Eastway appealed the dismissal of its action, and the municipal defendants cross-appealed the denial of attorney's fees.

The Court of Appeals affirmed the dismissal, but characterized the claims as "groundless" for purposes of determining entitlement to attorney's fees. Eastway I. It remanded for an award of attorney's fees to the municipal defendants. Costs incurred in defending the civil rights claim were to be assessed against plaintiffs alone under 42 U.S.C. § 1988, while costs incurred in defending the antitrust claim were to be

assessed against plaintiffs or plaintiffs' counsel or both under Rule 11 of the Federal Rules of Civil Procedure. The case is therefore now before this court for a determination of 1) the proper amount of attorney's fees to be awarded to the municipal defendants, and 2) the person or persons who should pay the fees.

II. LAW

A. Purpose and Relationship of Rule 11 and 42 U.S.C. § 1988

The traditional American rule is that each party to litigation bears its own costs, including attorney's fees. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). This furthers our policy, demonstrated also by fee absorption and other devices such as contingency fees, of keeping the courts as open as possible. Congress has over the years enacted

numerous statutory exceptions to the general rule against fee-shifting. The courts, through rules and interpretation, have gradually expanded these exceptions.

Courts have quite properly distinguished between two different purposes of the fee-shifting statutes and rules. One purpose is to compensate plaintiffs for the actual cost of vindicating legal rights, by partial analogy to the English system, in order to encourage private-attorney general suits in enforcement of important public policies. The second is to deter unfounded claims and defenses by assessing fees as a punitive measure. The second purpose is usually applied in favor of defendants, with the secondary effect of compensating the aggrieved litigant for legal fees that he should never have been forced to incur.

Prominent among statutes providing an incentive for private enforcement of federal

law is the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988 (1982), which provides for grants of attorney's fees to successful parties in actions brought under 42 U.S.C. §§ 1981-1983 & 1985-1986 and other civil rights provisions. Similarly, the Civil Rights Act of 1964 contains a provision awarding attorney's fees to successful parties in actions brought under Title VII of the Act. See § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b)(1982); Eastway I at 252-54; Erie Conduit Corp. v. Metropolitan Asphalt Paving Association, 106 F.R.D. 451, 455-56 (E.D.N.Y. 1985) (Maletz, J.) (discussion of statutory and judicial exceptions to the American Rule).

In applying these statutes to determine when to make awards of attorney's fees to plaintiffs, courts have been quite liberal, concluding that attorney's fees are routinely available to all prevailing plaintiffs. There

are two reasons for such openness. "First, ... the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978), quoting Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (citation omitted). The plaintiff, in short, is acting as a private attorney general, and such behavior is to be encouraged by liberal compensation. See Copeland v. Marshall, 641 F.2d 880, 899 (D.C. Cir. 1980) ("The purpose of Title VII's fee award provision ... is to encourage the private enforcement of the civil rights laws.").

In addition to fee-shifting provisions that are intended to encourage the bringing

of some lawsuits, there are provisions intended to deter the bringing of others. It is these provisions that are of primary interest in this case. Among them are the two provisions just discussed, 42 U.S.C. § 1988 and 42 U.S.C. § 2000a-3(b), as applied in determining whether to award fees to prevailing defendants, as well as Rule 11 of the Federal Rules of Civil Procedure. The purpose of these provisions is to discourage litigants from bringing frivolous cases or making frivolous motions.

Because such provisions 1) are in derogation of the general American policy of encouraging resort to the courts for peaceful resolution of disputes, 2) tend to breed time-consuming and expensive satellite litigation, and 3) increase tensions among the litigating bar and between bench and bar, the standard for imposition of sanctions is high. The provisions do not entitle all

prevailing defendants to an award of fees; instead, fees are to be awarded only if the claim or motion was entirely unjustified, i.e., frivolous. Although they do contain a compensation element, the primary purpose of this group of provisions is deterrence. See, e.g., Advisory Committee Notes to Rule 11 ("The word 'sanctions' in the caption ... stresses a deterrent orientation in dealing with improper pleadings, motions or other papers."); S.M. Kassin, An Empirical Study of Rule 11 Sanctions at 29 (Federal Judicial Center 1985) ("[T]he majority of judges ... expressed a belief that deterrence is the most important purpose of sanctions."); Carrion v. Yeshiva University, 535 F.2d 722, 727 (2d Cir. 1976) (in passing § 706(k) and allowing for awards of attorney's fees to defendants, "Congressional intention was to ... discourage baseless or frivolous actions"; power to be "sparingly exercised");

Rapisardi v. Democratic Party of Cook County, 583 F. Supp. 539, 543-44 (N.D. Ill. 1984) (court granted defendants attorney's fees of a modest amount under 42 U.S.C. § 1988, stating that an award of that size "accomplishes the deterrent purpose of the statute, [and] affords the defendant some compensation"); Kostiuk v. Town of Riverhead, 570 F. Supp. 603, 612-13 (E.D.N.Y. 1983) (court granted defendants nominal fees under §1988, stating that the amount was "not intended to ... fully compensate defendants," but that it would hopefully be "sufficient to serve as a caution to potential litigants with similar claims"). Cf. Taylor v. Prudential Bache-Securities, Inc., 594 F. Supp. 226 (N.D.N.Y.), aff'd mem., 751 F.2d 371 (2d Cir. 1984) (purposes of Rule 11 are deterrence and compensation); Index Fund Inc. v. Hagopian, 107 F.R.D. 95 (S.D.N.Y. 1985)

(though Rule 11 is intended both to deter and to compensate, court awarded only nominal fees of $100).

While none of the deterrence-oriented provisions actually uses the word "frivolous," courts nonetheless consistently employ a "frivolousness" standard in determining whether an award of fees is appropriate. To properly inform the bar, simplify administration, and maximize substantive impact, it is advisable that the degree of frivolousness needed to trigger sanctions under each of these provisions be the same.

"Frivolous" is of the same order of magnitude as "less than a scintilla." It is defined in Webster's Third New International Dictionary (1967) as "of little weight or importance: having no basis in law or fact: light, slight, sham, irrelevant, superficial." The Oxford English Dictionary (1971) defines

it as "[o]f little or no weight, value or importance; paltry; trumpery; not worthy of serious attention; having no reasonable ground or purpose ... In pleading: Manifestly insufficient or futile."

If a claim is deemed frivolous for the purpose of imposing sanctions under Rule 11, it should also be considered frivolous for the purpose of imposing sanctions under section 1988. At least one court of appeals has expressly endorsed the application of a uniform standard for determining frivolousness. See Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 & n. 8 (9th Cir. 1986) ("[T]he district court correctly adopted and applied for purposes of Rule 11 sanctions the standard applicable for the award of fees to prevailing defendants under the civil rights acts .... The same standard is applied to the award of fees under the Securities Exchange Act of 1939, 15 U.S.C.

§78i(e) (1982) and the Securities Act of 1933, 15 U.S.C. §77k(e) (1982)."); see also Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) (applying Christiansburg standard to requests in securities actions for attorney's fees under 15 U.S.C. § 78i(e)).

B. Role of the District Court

Once a trial court determines that a claim or motion fails to meet the standard for nonfrivolousness, the court of necessity has a great deal of discretion in deciding on the nature of the sanction, and if it be an award of attorney's fees, how much to award. This is because the trial court's role is to provide the "appropriate" deterrent. Rule 11 of the Federal Rules of Civil Procedure for the United States District Courts is directed to the trial judge. It requires that the trail court "impose ... an appropriate sanction."

Punishment should never exceed the amount required to achieve the result desired. A deterrent is therefore appropriate when it is the minimum that will serve to adequately deter the undesirable behavior. See U.S. v. Brennan, 629 F. Supp. 283, 307 (E.D.N.Y. 1986); Nemerson, Coercive Sentencing, 64 Minn. L. Rev. 669 (1980); see also Schwarzer, Sanctions Under the New Federal Rule 11, 104 F.R.D. 181, 201 (1985) ("The basic principle governing the choice of sanctions is that the least severe sanctions adequate to serve the purpose should be imposed."); Advisory Committee Notes to Rule 11 ("The court ... retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case ...."); Faraci v. Hickey - Freeman Company, Inc., 607 F.2d 1025, 1028 ("Recent legislation extending the

power of the federal courts to award attorneys' fees by no means requires abandonment of the equitable principles that have traditionally governed a court's discretion in such matters. On the contrary, the express grant of authority to award fees presumes continued application of equitable considerations in appropriate cases, both to effectuate the broader legislative purpose and to do justice in the particular case."); Colucci v. New York Times Co., 533 F. Supp. 1011, 1013 (S.D.N.Y. 1982) ("the equities of the situation are to be considered to ensure that although the deterrent purpose of the statute [§ 706(k)] is enforced, a losing party is not subjected to financial ruin"); Rapisardi v. Democratic Party of Cook County, 583 F. Supp. 543 (N.D. Ill. 1984) ("In the court's discretion [under § 1988] to determine the amount of the fee to be awarded [to the defendants],

small as well as large fees are permissible.").

Rule 11 on its face grants the trial judge the discretion not only to decide how much attorney's fees to award, but also whether or not to grant attorney's fees at all. The Rule states that when a filing is determined to be frivolous, the court "shall" impose sanctions, which sanctions "may" -- not must -- include an order to pay the other party's expenses. Other sanctions such as a reprimand or an order that the attorney take certain remedial courses or consult with skilled attorneys or attend court sessions are all available in place of a monetary award.

Recognizing that trial courts must have great discretion in fashioning proper sanctions under deterrence-oriented fee-shifting provisions, appellate courts have enunciated an "abuse of discretion" standard

for reviewing specifics of fee awards. See, e.g., Eastway I at 254 n. 7 ("In reviewing the specifics of an award [under Rule 11] of attorneys' fees, ... we shall continue to adhere to the 'abuse of discretion' standard."); Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1985) ("[I]f the appropriateness of the [Rule 11] sanction imposed is challenged, we review the sanction under an abuse of discretion standard."). This practice and standard placing primary reliance on trial court discretion has been applied to a wide range of deterrence-oriented provisions. See Zaldivar, 780 F.2d 823, 828 n.4, and cases cited therein. Necessarily, the district court will have a better grasp of what is acceptable trial-level practice among litigating members of the bar than will appellate judges. Cf. Garguil v. Tompkins, No. 85-7382, slip op. at 3340 (2d Cir. May

14, 1986) ("District Judge, whose experience with New York law deserves deference"); Anderson v. City of Bessemer City, 105 S.Ct. 1504 (1985).

In addition, where the decision whether to impose any sanctions rests on resolution of factual issues, i.e., whether an attorney conducted the "reasonable inquiry" required by Rule 11, the trial court's findings are reviewed under the "clearly erroneous" standard. See Zaldivar, 780 F.2d 823, 828; see also Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985); see generally Anderson v. City of Bessemer City, 105 S.Ct. 1504 (1985) (requiring deference to trial court's findings of fact).

C. Issues in Imposing Rule 11 Sanctions

(1) Objective and Subjective Standards.

Rule 11 read literally contains both subjective and objective components. In pertinent part, it states:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record .... The signature of an attorney ... constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law .... If a pleading, motion, or other paper is signed in violation of this rule, the court ... shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other papers, including a reasonable attorney's fee.

(emphasis added). The text suggests that the obligation imposed by the Rule is partly objective, and partly subjective. The requirement that the attorney base his certification on a "reasonable inquiry" is objective, because what is "reasonable" is judged by objective norms of reasonable attorneys. But the certification itself need only state that the motion is well grounded "to the best of [the attorney's] knowledge, information, and belief." Since the certification relates to the attorney's own beliefs, it appears that it should be judged by a subjective standard. Even the subjective component has objective aspects since, as a matter of evidence, the judge will rely on what reasonable lawyers would have known or believed under the circumstances in deciding what this lawyer believed.

The objective "reasonable inquiry" element of Rule 11 serves to protect attorneys who reach reasonable, but erroneous, conclusions about the validity of their cases. Before a suit is filed, often only a limited investigation into the law and facts is possible. If an attorney makes a reasonable investigation under the circumstances and concludes based on that investigation that the pleading is well grounded in law and fact, he cannot be sanctioned for filing the pleading when time and discovery prove that the plaintiff does not in fact have a viable claim. See Advisory Committee Notes to Rule 11 ("[W]hat constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer ... [and] whether he had to rely on a client for information as to the facts underlying the pleading ....").

A more difficult question is whether the apparently subjective element of Rule 11 can protect attorneys who honestly reach unreasonable conclusions about the factual or legal strength of their cases. What if an attorney conducts a reasonable inquiry into the facts and the law and concludes, honestly but mistakenly, that the law supports his pleading, even though the pleading would be recognized as plainly frivolous by a minimally competent member of the bar? A literal reading of the Rule would indicate that such conduct is not sanctionable because the attorney has clearly complied with the letter of the Rule: he has certified that to the best of his knowledge, information and belief, formed after a reasonable inquiry into the facts and the law, that the pleading is well grounded. This reading is also supported by the rationale behind the Rule, namely

deterrence. While sanctioning an attorney's failure to make a reasonable inquiry might make him more diligent in the future, sanctioning honest errors is unlikely to prevent their recurrence. Cf. The American Law Institute, Model Penal Code Tentative Draft No. 4, at 140 (1955) ("In the absence of minimal culpability, the [criminal] law has neither a deterrent nor corrective nor an incapacitative function to perform.").

Eastway I holds that policy requires that Rule 11 not be read according to its literal terms. In a telling paraphrase of the language of Rule 11, the Second Circuit restated the requirement of the Rule as follows: "[S]anctions shall be imposed [if], after a reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law ...." Eastway I at 254 (emphasis added). While

the Rule requires certification only by the actual attorney of his actual beliefs, Eastway I requires the reasonable beliefs of a hypothetical competent attorney. The Second Circuit's restatement of the rule effectively eliminates the subjective element incorporated by the drafters of the Rule. As a result, an attorney's erroneous conclusion that a pleading is well grounded may lead to sanctions. Eastway I, in other words, holds attorneys strictly liable for mistakes in judgment that lead to the filing of papers later deemed frivolous. Accord, Wells v. Oppenheimer & Co., Inc., 101 F.R.D. 358, 359 & n.3 (S.D.N.Y. 1984), vacated on other grounds, 106 F.R.D. 258 (S.D.N.Y. 1985); but cf. Baranski v. Serhant, 106 F.R.D. 247 (N.D. Ill. 1985) (mistake can be a defense to Rule 11 motion). While application to lawyers of a penal rule from which mens rea has been

eliminated is inconsistent with American penal and professional traditions, the courts of this circuit are bound by Eastway I.

(2) Due Process Right to a Hearing.

Rule 11 does not address the issue of the procedural rights of attorneys and clients who are being sanctioned. The Advisory Committee Notes to Rule 11 contains a mixed message about procedural rights. While the Notes comment that "[t]he procedure obviously must comport with due process requirements," they go on to suggest that procedural safeguards should be kept to a minimum:

> To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record.

Id. In the absence of specific instructions from the Rule, our discussion of the due process issue must be based on general principles.

Due process requires, at a minimum, notice and an opportunity to be heard "appropriate to the nature of the case." Goss v. Lopez, 419 U.S. 565, 579 (1975), quoting Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950). In the case of sanctions this would seem always to require that the attorney be given notice of the motion for fees and have an opportunity to address the court before sanctions are imposed. The Supreme Court has endorsed this notion. In Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980), it noted that like other sanctions, "attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." See also, e.g.,

The Committee on Federal Courts, Procedural Rights of Attorneys Facing Sanctions, 40 The Record 313, 323 (1985); cf. Adamsons v. Wharton, 771 F.2d 41, 43 n.4 (2d Cir. 1985).

The constitutional mandate that the due process rights be appropriate to the nature of the case also requires that an evidentiary hearing be held if necessary. An evidentiary hearing will be necessary "when the imposition of the sanction is dependant upon facts genuinely in dispute." The Committee on Federal Courts at 323-24. See also Schwarzer, Sanctions Under the New Federal Rule 11, 104 F.R.D. 181, 198 (1985) (evidentiary hearing "should be avoided, unless the court must find disputed facts or resolve issues of credibility."). An analysis of the Rule shows that in many Rule 11 cases the potential exists for factual disputes

that would entitle an attorney to request an evidentiary hearing.

As pointed out earlier in this opinion, there are two basic ways in which Rule 11 might be violated. First, an attorney might violate the Rule by failing to make a reasonable inquiry into the facts and law. Second, according to Eastway I, an attorney might also violate the Rule by failing to draw the "reasonable" conclusions that a "competent" attorney would have reached.

In the first type of Rule 11 violation, it is obvious why there may be genuine factual disputes: the nature of the inquiry actually conducted is an issue of fact. In other words, whether sanctions ought be imposed may depend on disputed facts about what kind of inquiry was made.

In the second type of Rule 11 violation, the decision whether or not to impose sanctions does not depend on any facts

relating to the attorney's investigation or reasoning. Presumably a judge can take judicial notice of what a reasonable attorney should know. See Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194, 205-206 (7th Cir. 1985) (no hearing needed when complaint was legally deficient and "overblown"); cf. Federal Rules of Evidence, Rule 201. Appropriate modesty would, even here, in many cases suggest that generalist federal judges might not be fully aware of what reasonable and competent members of the bar consider a reasonable conclusion. A hearing would thus be required in many instances even under the objective test.

Hindsight rationalizations for finding frivolousness must constantly be guarded against. See Advisory Committee Notes to Rule 11 ("the court is expected to avoid using the wisdom of hindsight"); Erie Conduit Corp. v. Metropolitan Asphalt

Paving Association, 106 F.R.D. 451, 459 (E.D.N.Y. 1985) (Maletz, J.). Judicial opinion-writing style is well-known; after the judge equivocates in chambers and cogitates, with the decision wavering in the balance, the opinion is written in an adversarial fashion as if the court never had been dubitante and the outcome was always inevitable. This is deemed necessary, perhaps, on the theory that the law must seem certain to be respected. See K.N. Llewellyn, The Common Law Tradition: Deciding Appeals 24 (1960).

Even if, as required by Eastway I, a strict liability standard for attorney errors is imposed, and even if it is imposed without hearing, there is the issue of the amount of sanctions to be imposed. This decision may well depend on the factual circumstances that led to the attorney's mistake. As will be developed below, many factors may justify

the court's mitigating the severity of the sanctions imposed. On this issue an attorney must be given the opportunity to present evidence to the trial court before he or she or the client is severely sanctioned. See The Committee on Federal Courts, Procedural Rights of Attorneys Facing Sanctions, 40 The Record 313, 326 (1985).

(3) Allocation of the Sanction Between the Attorney and the Client.

Rule 11 authorizes the trial court to impose sanctions upon the attorney, his client, or both, but provides no standards to guide the court's decision as to how the allocation should be made. Both courts and commentators have suggested that the court should direct sanctions at whoever is responsible for the filing of the frivolous paper. See Weisman v. Rivlin, 598 F. Supp. 724, 727 n.4 (D.D.C. 1984) (sanctions assessed against attorney, because "that is

where the fault lies"); The Committee on Federal Courts, Procedural Rights of Attorneys Facing Sanctions, 40 The Record 313, 325 (1985) (court should "allocate the imposition of sanctions between an attorney and his client based upon their culpability").

In practice, assessment of fault between attorney and client is rather difficult. There are some cases in which it is fairly clear who should be sanctioned. For example, the attorney alone is generally responsible for sharp practice, such as a frivolous motion to disqualify opposing counsel. See Wold v. Minerals Engineering Co., 575 F. Supp. 166 (D. Colo. 1983) (sanctions for frivolous motion to disqualify counsel imposed against attorney alone). And where the client misleads his attorney and thus causes him to file frivolous papers, it is apparent that the client, not the attorney, should be sanctioned. See

Friedgood v. Axelrod, 593 F. Supp. 395 (S.D.N.Y. 1984) (where plaintiff lied to his attorney leading to frivolous civil rights lawsuit, sanctions imposed against plaintiff under 42 U.S.C. § 1988, but no sanctions imposed against attorney under Rule 11). Most cases, however, will not fall into either extreme, leaving the court with a great deal of discretion and very little direction in allocating sanctions. Cf. Schwarzer, Sanctions Under the New Federal Rule 11, 104 F.R.D. 181, 203 (1985) (suggesting that where the violation reflects deliberate litigation strategy, court should assess joint and several liability).

Even this analysis, modest as it is, is not quite accurate. In the case in which it was suggested that fees be assessed against the client alone, Rule 11 does not--technically speaking--even apply. Rule 11 does not, by its terms, provide for

sanctions against the filing of frivolous papers. Rather, it provides for sanctions against an attorney's filing papers without making an adequate inquiry. In a case in which an attorney makes a reasonable inquiry into the facts but still ends up filing a frivolous pleading because his client deceived him, there has technically not been any violation of Rule 11. Consequently, there is technically no basis for the imposition of sanctions, even against the client who in bad faith induced the filing of a frivolous suit. This conclusion, however, is completely at odds with the spirit of the Rule. It would also lead to bizarre consequences, because it would mean that clients could be sanctioned in cases where they were partially responsible for filing frivolous papers, but not in cases where their responsibility was total. The better conclusion is that sanctions may be imposed

against the client under the circumstances described above despite the flaw in the Rule's language.

As the trial court attempts to determine fault and allocate fees on that basis, the risk of creating substantial satellite litigation at great cost to the parties increases. First, there is a problem because of conflict of interest. If attorney and client disagree about who is at fault and point their fingers at each other, the interests of the two are now clearly adverse. The client, therefore, will need new counsel to represent him against his former counsel in the proceedings to determine fault. See Schwarzer, Sanctions Under the New Federal Rule 11, 104 F.R.D. 181, 199 (1985) (noting potential for conflict between client and attorney, and also between co-counsel). Second, the question of who is at fault is likely to involve disputed issues of fact, making

further evidentiary hearings necessary. See The Committee on Federal Courts, Procedural Rights of Attorneys Facing Sanctions, 40 The Record 313, 325 (1985). The implications of such a hearing, turning attorney against client, and the effect on attorney-client privilege and trust, may be devastating. Cf. Proposed Rules of Evidence for United States Courts and Magistrates, Rule 503(d)(3), 56 F.R.D. 183, 236 (1973) (lawyer-client privilege is inapplicable where there has been a breach of duty by the lawyer or client).

The reverse scenario, in which attorney and client not only do not contest relative fault before the court, but have agreed between themselves to privately reallocate any sanction imposed against them, may also present problems. The attorney and his client do not stand as equals before the court. Sanctions are imposed against the

client purely for their deterrent effect. But sanctions are imposed against the attorney also for disciplinary purposes, as a punishment for dereliction of duty by an officer of the court who should know better. Allowing the client to reimburse the attorney would interfere with the court's attempt to maintain discipline. Therefore, reimbursement by the client should be prohibited. See Schwarzer, Sanctions Under the New Federal Rule 11, 104 F.R.D. 181, 203 (1985); Wold v. Minerals Engineering Co., 575 F. Supp. 166, 168 (D. Colo. 1983). An attorney's agreement to reimburse his client presents no analogous problems, and therefore need not under usual circumstances be interfered with. Unless, therefore, the court explicitly rules otherwise, the attorney may assume fees assessed against the client, but the client may not pay fees imposed on the attorney.

(4) Allocation of Rule 11 Sanctions by Cause of Action.

Rule 11 provides that the court may assess fees to cover "reasonable expenses [including attorney's fees] incurred because of the filing of the [frivolous] pleading, motion, or other paper ...." Since fees may be assessed only for frivolous filings, it may be necessary to analyze the contents of a filing and examine each of its constituent parts to determine the proper amount of the fee award. If, for example, a pleading states two unrelated causes of action, one of which is frivolous and one of which is not, attorney's fees may be assessed only for the time spend responding to the frivolous part of the pleading. See Weisman v. Rivlin, 598 F. Supp. 724, 726 (D.D.C. 1984) ("the rule requires that the work expended be causally linked to the improperly filed paper"); Schwarzer, Sanctions Under the New Federal

Rule 11, 104 F.R.D. 181, 203 (costs not attributable to the offending paper must be segregated and excluded from the award"); see also Hensley v. Eckerhardt, 461 U.S. 424, 103 S.Ct. 1933 (1983) (where plaintiff in civil rights action prevailed only on some of his claims, he was not entitled under section 1988 to attorney's fees on the unsuccessful claims). Analyzing filings in this way may require further hearings with extensive and difficult analysis of an attorney's time records, but there is generally no alternative under the Rule. Cf. Hensley, 103 S.Ct. at 1940 (Supreme Court expresses the hope that "cases involving such unrelated claims [will be] unlikely to arise with great frequency").

(5) Amount of the Sanctions.

Determining the kinds of sanctions and the amount of fees, if any, to be imposed requires consideration of the following factors: a) the cost of the Rule 11 violation to the party seeking sanctions, and b) mitigating factors such as (i) whether the client and lawyer believed they were correct in taking the course they did; (ii) whether there was vindictiveness or a desire to punish an opponent; (iii) whether the lawyer is a neophyte who needs education, a repeat offender, or a person of standing at the bar whose actions have heretofore been ethical and in the high tradition of the bar; (iv) the ability to pay; (v) the need for compensation; (vi) the degree of frivolousness; and (vii) the dangers in chilling the particular kind of litigation involved. In addition, there are questions

relating to compensation for time spent on Rule 11 sanction litigation and on appeals.

(a) Expenditures of party seeking sanctions--lodestar method and market rates.

The logical starting point for a determination of attorney's fees is a calculation of the number of hours reasonably expended in responding to the frivolous paper, multiplied by a reasonable hourly attorney's fee based on the prevailing market rate. See, e.g., Perez v. Velez, 629 F. Supp. 734 (S.D.N.Y. 1986) (market rates awarded to Corporation Counsel). This may be adjusted upward as a reward for work of exceptional quality. See Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541 (1984). That is the approach used to determine awards of attorney's fees to prevailing plaintiffs under section 1988, even when the plaintiff is

represented by a nonprofit legal service organization, rather than by counsel paid a fee based on an hourly rate. See Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541 (1984); Hensley v. Eckerhardt, 461 U.S. 424, 103 S. Ct. 1933 (1983).

The plaintiffs in this case urge that Rule 11 does not contemplate the award of market-based rates to parties who are represented by in-house counsel, as was the defendant seeking fees in this case. They point first to the working of Rule 11, which speaks of "expenses incurred ... including a reasonable attorney's fee," as opposed to section 1988, which simply "allow[s] the prevailing party ... a reasonable attorney's fee as part of the costs." The argument goes that the "incurred" language in Rule 11 prevents the court from awarding more than the party's actual cost. This contention is not persuasive because nothing in the Rule

or the Advisory Committee Notes suggests that the inclusion of that single word was intended to completely alter the usual method of calculating attorney's fees. Courts have applied caselaw developed under section 1988 to other differently-worded fee statutes, discounting arguments that slight differences in wording should make a difference. See, e.g., Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania, 762 F.2d 272, 275 (3d Cir. 1985) (applying caselaw developed under section 1988 to fee award provision of the Clean Air Act, which speaks not of "costs," but of "costs of litigation"), cert. granted, 106 S. Ct. 1464 (1986).

Practical problems of administration suggest that a single readily ascertainable market rate be applied where possible. See In re Agent Orange Product Liability Litigation, 611 F. Supp. 1296, 1308-09 (E.D.N.Y. 1985). This approach would

treat inside, public, and eleemosynary counsel in the same way, at least in determining a lodestar figure.

Plaintiffs also attempt to distinguish existing section 1988 caselaw on policy grounds. Nearly all the cases allowing market rates to parties represented by non-profit counsel in civil rights actions involve prevailing plaintiffs. As was noted earlier, section 1988 as applied to plaintiffs is a litigation-encouraging provision; Rule 11, by contrast, is a litigaton-deterring provision. Market-based fees are awarded to prevailing plaintiffs in section 1988 cases, even where they exceed cost, because we wish to encourage such suits. Since this reasoning is inapplicable to awards under Rule 11, the submission is, only cost-based fees should be allowed.

While this argument has obvious weight, it is not convincing. Granted that the

purpose of Rule 11 is deterrence; this still does not prove that only cost-based rates are appropriate. There might certainly be cases in which an attorney's conduct is so egregious that the only appropriate sanction is one that is well above the actual monetary damage caused by the frivolous filing. The deterrent nature of the Rule, therefore, does not preclude a market-based fee award to a party represented by in-house counsel. Cf. Schwarzer, Sanctions Under the New Federal Rule 11, 104 F.R.D. 181, 202 (1985) (discussing the use of fines unrelated to attorney's fees as a sanction under rule 11); Donaldson v. Clark, No. 85-8270 (11th Cir. Apr. 22, 986) (approving imposition of fines under Rule 11); Dore v. Schultz, 582 F. Supp. 154 (S.D.N.Y. 1984) (imposing $250 fine under Rule 11).

(b) Mitigating factors leading to a reduction of the award.

While agreeing on the propriety of starting the calculation of an award of attorney's fees by multiplying a reasonable number of hours a by reasonable hourly rate, courts have not ended their inquiries at that point. Without explaining why they are doing it--and often without even noting that they are doing it--courts have reduced their awards of fees to prevailing defendants in both Rule 11 and section 1988 cases. In many cases a nominal award results. See, e.g., Index Fund v. Hagopian, 107 F.R.D. 95 (S.D.N.Y. 1985) ($100 award under Rule 11); Heimbaugh v. City of San Francisco, 591 F. Supp. 1573 (N.D. Cal. 1984) ($50 award under Rule 11); Weisman v. Rivlin, 598 F. Supp. 724 (D.D.C. 1984) ($200 awarded under Rule 11, where over $4,000

was requested); Kuzmins v. Employee Transfer Corp., 587 F. Supp. 536 (N.D. Ohio 1984) ($100 awarded under section 1988); Kostiuk v. Town of Riverhead, 570 F. Supp. 603, 612 n.4 (E.D.N.Y. 1983) ($250 awarded under section 1988, even though it was "beyond dispute that the actual legal expenses of ... defendants far exceeded this amount"); see also Taylor v. Prudential Bache Securities, Inc., 594 F. Supp. 226, 228-29 (N.D.N.Y.), aff'd mem., 751 F.2d 371 (2d Cir. 1984) ("While ... the Court views the request [under Rule 11] as both a realistic and a reasonable one, it will nonetheless reduce the award substantially.") This unbroken line of authority requires us to consider the factors apart from the lodestar figure that courts must take into account in determining monetary Rule 11 sanctions.

(i) Subjective Factors--Generally. As was demonstrated earlier, Rule 11, at least as interpreted by the Second Circuit in Eastway I, uses a purely objective standard amounting in many cases to strict liability to determine when to impose sanctions. But a pure strict and unmitigated liability standard in determining the form of the sanctions in Rule 11 cases is inappropriate. Because the purpose of Rule 11 is deterrence through punishment, the Rule is quasi-criminal. It is well established in Anglo-American law that strict liability is used in criminal law only in narrow circumstances; in most cases, the defendant's mens rea is a focal point of the law's inquiry. By analogy, in fixing a penalty, the law must be reluctant to ignore the state of mind of the attorney being sanctioned in Rule 11 cases. Since state of mind is not a factor in determining whether the Rule has been violated, it must be

introduced in the second stage of the proceeding, and given weight in deciding on the severity of the sanctions. As Professor Kassin pointed out in an excellent study of Rule 11:

> [I]t seems reasonable to propose a bifurcated task that explicitly distinguishes the dual requirements that sanctions be "mandatory" (a statement of whether they should be imposed) and "appropriate" (a statement of severity). Essentially, this kind of approach would enable courts to resolve the conflict by granting sanctions according to a strict objective standard, but then engaging subjective-faith considerations in setting an amount.

S.M. Kassin, An Empirical Study of Rule 11 Sanctions at 45 (Federal Judicial Center 1985).

(ii) Subjective Factors -- Vindictiveness and Desire to Punish Opponent. It is widely agreed that the "wilfulness" of the violation is of major

importance. See, e.g., Friedgood v. Axelrod, 593 F. Supp. 395, 397 (S.D.N.Y. 1984) (court can consider plaintiff's "vindictiveness"); Weisman v. Rivlin, 598 F. Supp. 724, 727 (D.D.C. 1984) (award reduced because only negligence, not wilfulness, shown); Rapisardi v. Democratic Party of Cook County, 583 F. Supp. 543 (N.D. Ill. 1984); Advisory Committee Notes to Rule 11 ("[I]n considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed."). Issues involved in determining willfulness include whether the attorney or client knew the filing was frivolous, whether the filing was used to harass or punish the opposing party, and whether the offending party unnecessarily

increased the cost of litigating the filing at issue.

(iii) First Offenders and Others of Good Repute. Other factors should be considered as well. For example, the court should be more lenient with first offenders with an otherwise good reputation than with an attorneys or clients who have a history of filing frivolous actions. See In re Itel Securities Litigation, 596 F. Supp. 226, 235 (N.D. Cal. 1984) (court's decision to impose heavy sanctions on plaintiff's counsel based in part on his "history in this type of litigation"). Some younger members of the bar need assistance in avoiding future delicts and the court should educate rather than punish them. Other lawyers may be distinguished and ethical members of the bar who slipped on a single occasion and need no punishment to prevent future problems.

Similarly, where a filing has been deemed to be legally, as opposed to factually, frivolous, the court should be more lenient on nonspecialists than on attorneys who have great expertise in the area of law involved, although there are circumstances where the attorney should have been aware that a specialist should have been consulted. See Advisory Committee Notes to Rule 11. As Judge Schwarzer point out:

> While all attorneys practicing in the federal court are subject to its rules, it is not realistic to hold all to the same standards. For example, a failure to cite contrary authority may be excusable neglect in the case of an inexperienced solo practitioner but amount to serious misconduct if perpetrated by a lawyer from a large, well-equipped law firm engaged in a substantial matter. Similarly, violations by persons appearing pro se must be judged differently from those of lawyers.
>
> Thus a violation may stem from a variety of causes: inexperience, incompetence, neglect, willfulness

> or deliberate choice. The need for punishment and deterrence is a function of the cause of the violation. In assessing the cause, the judge should consider not only the circumstances of the particular violation but also the factors bearing on the reasonableness of the conduct, such as experience and past performance of the lawyer and his firm, and the general standard of conduct of the bar of the court.

Schwarzer, Sanctions Under the New Federal Rule 11, 104 F.R.D. 181, 201 (1985).

(iv) Ability to pay. The deterrent effect of an award of attorney's fees of a given sum of money is obviously dependent on the extent of the sanctioned party's resources. The poorer the offender, the smaller need be the sanction to ensure the desired deterrent effect. See e.g., Oliveri v. Thompson, CV-83-3572 (E.D.N.Y. Dec. 23, 1985) (reducing sanction against attorney from $51,000 to $5,000 because of his financial condition). Accordingly, many

courts have reduced fee awards based on ability to pay. Most of these cases arise under section 706(k) of the Civil Rights Act of 1964 or under section 1988, because these provisions require that the sanction be imposed only against the client, and not against the attorney, and plaintiffs with civil rights claims usually are poorer than attorneys subject to Rule 11 sanctions. Rule 11 cases in which the issue arises usually involve pro se plaintiffs. See, e.g., Faraci v. Hickey Freeman Co., Inc., 607 F.2d 1025 (2d Cir. 1979) (section 706(k) award); Colucci v. New York Times Co., 533 F. Supp. 1011 (S.D.N.Y. 1982) (same); Kostiuk v. Town of Riverhead, 570 F. Supp. 603 (E.D.N.Y. 1983) (section 1983 case); Kuzmins v. Employee Transfer Corp., 587 F. Supp. 536 (N.D. Ohio 1984) (same); Taylor v. Prudential-Bache Securities, 594 F. Supp. 226 (N.D.N.Y.), aff'd mem., 751 F.2d 371

(2d Cir. 1984) (Rule 11 case, pro se plaintiff); Heimbaugh v. City of San Francisco, 591 F. Supp. 1573 (N.D. Cal. 1984).

(v) Need for Compensation. The other side of the ability to pay concept is the need for compensation. A single suit of modest proportions will be insignificant to a major corporation while such a suit against an individual may have crushing economic effect. This factor needs to be taken into account to reduce any unnecessary burdens on plaintiff or his counsel.

(vi) Degree of frivolousness. Court opinions on attorney's fees speak easily of cases being either frivolous or nonfrivolous, as if all cases fit easily into one or the other category. Reality is more complicated. In the legal world, claims span

the entire continuum from overwhelmingly strong to outrageously weak. Somewhere between these two points, courts draw a line to separate the nonfrivolous from the frivolous, the former category providing safe shelter, the latter subjecting attorney and client to sanctions.

Attorneys are thus placed in a dilemma because they have the right--in fact, they have an ethical obligation (subject to tactical considerations)--to present to the court all the nonfrivolous arguments that might be made on their clients' behalf, even if only barely nonfrivolous. They are forced by their position as advocates in the legal profession to live close to the line, wherever the courts may draw it. Yet Rule 11 threatens them with severe sanctions if they miscalculate ever so slightly the location of that line. As a result many members of the bar are concerned that Rule 11 will

discourage attorneys from pursuing novel yet meritorious legal theories. See, e.g., Snyder, The Chill of Rule 11, 11 Litigation 16 (Winter 1985). The necessity of avoiding such an effect has also been widely recognized. As the Court of Appeals so eloquently put the matter:

> [W]e do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation would run counter to our notion of the common law itself.

Eastway I at 254. See Taylor v. Prudential-Bache Securities, 594 F. Supp. 226, 229 (N.D.N.Y.), aff'd mem., 751 F.2d 371 (2d Cir. 1984); Advisory Committee Notes to Rule 11 ("The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."). Unless Rule 11 is applied in a

way that minimizes the tension between creativity and sanctions, a chilling effect seems inevitable.

In part, the solution seems to lie in frank recognition of the fact that rather than being adequately described by the frivolous-nonfrivolous dichotomy, cases really do lie along a continuum. Some are clearly frivolous, some clearly nonfrivolous, and some are difficult to call. Attorney fee awards of the full market value of services rendered should be reserved for extremely frivolous cases, while more moderate awards should be given for frivolous filings near the border. This approach harmonizes with the deterrent approach of the Rule. It penalizes more severely conduct that society seeks more strongly to deter. But it penalizes only lightly filings in that zone where the bar's imagination and creativity assert

themselves most strongly, helping to insulate attorneys from the chill of the Rule.

(vii) The Importance of Not Discouraging Particular Types of Litigation. By providing that when the court finds the pleading or other papers to be frivolous, it "shall" impose sanctions, Rule 11 takes the decision whether to impose sanctions out of the trial judge's hands. The premise underlying the Rule's mandatory sanction is that frivolous pleadings are worthless and are to be always condemned. But such an interpretation takes too narrow a view of the purposes of litigation.

Some litigations should be, if not encouraged, at least not discouraged. Of particular importance are cases brought against government officials and government agencies. Such suits are often the only effective channel for keeping within bounds

official arrogance and lawlessness. At the very least, they publicize grievances and thus permit the ventilation of private outrage that the First Amendment's right to petition protects. They serve the public policy of avoiding violence by providing a peaceful forum. They may provide the basis for legislative and executive ameliorative action even then the courts lack power to act. See, e.g., Mather, The Mobilizing Potential of Class Actions, 57 Ind. L.J. 451 (1982). Many civil rights cases fall into this category. So, too, do many prisoner habeas corpus cases. And even in what appear to be purely commercial actions, the threat of suit may deter official abuses such as favoritism.

Sometimes there are reasons to sue even when one cannot win. Bad court decisions must be challenged if they are to be overruled, but the early challenges are

certainly hopeless. The first attorney to challenge Plessy v. Ferguson was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to Brown v. Board of Education. Similarly, the apparently useless challenges by attorneys of the still relatively recent Supreme Court decision in Swain v. Alabama has within the last few weeks induced the Court to reconsider and reject that ill-conceived ruling. Batson v. Kentucky, ____ S. Ct. ____.

(c) Award of attorney's fees for time spent on the motion for fees.

In cases in which a prevailing plaintiff is awarded attorney's fees under section 1988, he is also entitled to an award of fees for time spent in connection with the fee application. See Gagne v. Maher, 594 F.2d

336 (2d Cir. 1979). The reason, according to the courts, is that any other approach would dilute the incentive provided by the fee award. Allowing attorney's fees for time spent on the motion for fees prevents any dilution of the incentive to bring civil rights actions.

A defendant requesting Rule 11 sanctions for a frivolous pleading is in a position analogous to that of a plaintiff in a civil rights action. Rule 11 differs from section 1988 as applied to plaintiffs in that it is designed to deter rather than encourage litigation. Nonetheless, the Rule is intended to further a governmental interest, in this case deterring frivolous actions from reaching the courts. In requesting Rule 11 sanctions, the defendant is acting as a private attorney general, enforcing the federal policy of deterring frivolous suits. In order not to discourage parties from

bringing warranted Rule 11 sanctions, the time spent on the motion for fees should be taken into account in calculating the lodestar figure. See, e.g., Perez v. Velez, 629 F. Supp. 734, 737-38 (S.D.N.Y. 1986) (awarding attorney's fees for time spent on the motion for attorney's fees).

Only time reasonably expended on the motion for attorney's fees should be includible in the lodestar calculation. If, for example, the defendant requests attorney's fees of an excessive amount, the plaintiff should certainly be entitled to contest the request without having to pay for the additional expenses being caused by the defendant's unreasonableness. Should defendant's fee request be so unreasonable as to itself rise to the level of frivolousness, Rule 11 sanctions may be imposed against the defendant for making that motion. Cf.

Hensley v. Eckerhardt, 103 S. Ct. 1933, 1940 n.10 (1983).

(d) Award of attorney's fees for time spent on appeal.

Prevailing plaintiffs in section 1988 cases are routinely awarded attorney's fees for time spent on a successful appeal. This is the logically correct result because success is the criterion for an award of fees to a civil rights suit plaintiff, and plaintiff's efforts on appeal have, by hypothesis, been successful. See Hastings v. Maine-Edwell Central School District, 676 F.2d 893 (2d Cir. 1982); Cohen v. West Haven Board of Police Commissioners, 638 F.2d 496 (2d Cir. 1981).

In the case of Rule 11, an award of attorney's fees for the costs of defending an appeal can be made only if the appeal was

frivolous. Generally the appellate court is in the best position to pass on whether an appeal is frivolous, and the district court is without authority to award attorney's fees for an appeal in the absence of instructions from the appellate court to do so. See Sierra Club v. United States Army Corps. of Engineers, 776 F.2d 383, 392 (2d Cir. 1985), cert. denied, 106 S. Ct. 1464 (1986); Hastings v. Maine-Edwell Central School District, 676 F.2d 893, 897 (2d Cir. 1982); see also Roth v. Pritikin, No. 85-7515 (2d Cir. Mar. 31, 1986); In re Cosmopolitan Aviation Corp., 763 F.2d 507, 517 (2d Cir. 1985); but cf. Westmoreland v. CBS, Inc., 770 F.2d 1168, 1179 (D.C. Cir. 1985) (attorney's fees incurred in successfully appealing district judge's refusal to award Rule 11 sanctions should be included in Rule 11 sanctions). In the absence of an explicit direction from the appellate court, trial

courts should not grant attorney's fees under Rule 11 for legal fees incurred on appeal.

D. Awards of Attorney's Fees to Prevailing Defendants Under Section 1988.

42 U.S.C. § 1988 provides that "[i]n any action or proceeding to enforce a provision of [certain civil rights statutes] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The circumstances under which prevailing defendants are to be awarded fees under which prevailing defendants are to be awarded fees under section 1988 were described by the Supreme Court in Hughes v. Rowe, 449 U.S. 5 (1980), which borrowed its standard from Christiansburg Garment Co. v.

E.E.O.C., 434 U.S. 412 (1978), a case concerned with the award of attorney's fees to prevailing defendants under section 706(k) of the Civil Rights Act of 1964. Christiansburg announced a standard essentially identical to the Second Circuit's purely objective interpretation of Rule 11. The Court wrote: "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. Id. at 421. The only important distinction between the two provisions is that sanctions under section 1988 may be assessed only against the opposing party, not its counsel.

Unlike Rule 11, which has a long, carefully drafted text and comes accompanied by even longer Committee Notes, the text of section 1988 is bare and brief. Furthermore, since Hughes and Christiansburg are quite recent cases, the caselaw applying the Hughes standard is still sparse. All in all, therefore, the law of attorney fee awards to prevailing defendants under section 1988 is poorly developed. But since sections 1988 and 706(k) and Rule 11 all have the same purpose and are applying the same standard, it is appropriate to borrow the caselaw of each to help develop the caselaw of the others. As already noted, treating awards under all the deterrence-oriented provisions similarly furthers both policy and ease of administration.

III. LAW APPLIED TO THE FACTS

Rule 11 provides that, once a finding of frivolousness is made, the court "shall" impose sanctions which "may" include attorney's fees. And, as the Court of Appeals recognized in Eastway I, "the district courts retain broad discretion in fashioning sanctions." Eastway I, 762 F.2d at 254 n.7. Yet in its remand order the Court of Appeals intervened in the fashioning of sanctions by ordering the trial court to impose a sanction under Rule 11 that included a "reasonable attorney's fee." The opinion of the Court of Appeals cannot be read to take away in its text discretion that it had just recognized in its footnotes and that is granted by the Rule. Presumably, the Court of Appeals decided, sub silento, that it

would be an abuse of discretion in this particular case for the district court not to impose as the sanction an award of attorney's fees.

The Court of Appeals found plaintiffs' complaint legally, rather than factually, frivolous. Under Eastway I's purely objective standard holding attorneys strictly liable for unreasonably filing frivolous papers, there was, the appellate court implicitly found, no need for a hearing to determine whether the Rule had been violated. Although the plaintiff was still entitled to an evidentiary hearing to provide proof of any factual circumstances supporting mitigation of the amount of attorney's fees, the plaintiff did not request a hearing and none was therefore held. The court did hear oral argument on the legal

standards involved, and the legal issues were briefed.

A. Number of Compensable Hours and Allowable Maximum Hourly Rate

The City requests an award of $58,550, which represents 395 3/4 hours of work for three different attorneys, John P. Woods, William L. Barish, and Fred Kolikoff. Mr. Barish worked on the antitrust and due process issues at the district court level, Mr. Woods on the attorney's fees issue at the district court level, and Mr. Kolikoff on the appeal to the Second Circuit. The City requests that fees be calculated using billing rates of $125 and $150 per hour. The hours for which compensation is requested include time spent on the motion for attorney's fees, as well as time spent on the appeal.

(1) Time Spent on the Motion for Fees.

As indicated earlier, time spent on a motion for attorney's fees should be included in the lodestar figure. The number of hours requested in this case - 184 - seems high, but is not excessive in view of the difficulty of the issues involved and the court's request on two occasions for supplemental briefs on various questions.

(2) Time Spent on the Appeal.

As was indicated above, a trial court should not compensate in its award of attorney's fees time spent defending an appeal, absent an explicit finding by the Court of Appeals that the appeal was frivolous and an order

directing the district court to award such fees. The Court of Appeals in its Eastway I opinion did not explicitly declare Eastway's position on appeal to be frivolous, and did not in its remand order instruct this court to award attorney's fees for the time spent by the City on the appeal. Accordingly, the City's request for attorney's fees for 43 hours spent by Mr. Kolikoff on the appeal must be denied.

(3) Maximum Allowable Fee.

The City requests compensation for 168 3/4 hours of Mr. Barish's time and for 184 hours of Mr. Woods' time, at an hourly rate of $150 per hour, for a total of $52,912.50. The number of hours requested is well-documented by affidavits, and justified by the

difficulty of the issues involved in the case. The hourly rate of $150 is reasonable for Assistant Corporation Counsel who, at the time the case was before this court, had been in practice for 8 and 9 years, respectively. See, e.g., Perez v. Velez, 629 F. Supp. 734, 738 (S.D.N.Y. 1986) (allowing rate of $140 per hour for an Assistant Corporation Counsel with seven years' experience). Mr. Barish's and Mr. Woods' work, while of consistently high quality, did not justify an upward adjustment through use of a multiplier. The maximum allowable fee in this case is therefore $52,912.50.

B. Mitigating Factors

(1) Subjective Factors.

There is no evidence or reason to believe that plaintiffs or their attorneys did not bring this action in good faith for the purpose of obtaining the relief they sought. Plaintiffs had suffered serious financial reverses as a result of the defendants' actions. The suit itself was undoubtedly expensive. Plaintiffs' extensive papers reflected a great deal of research into the law and the facts and were well written, undoubtedly at high hourly rates. There was no desire to punish defendants or to harass them. The relevant subjective factors therefore point towards imposition of mild sanctions.

(2) Frivolousness of the Complaint.

The severity of the sanction to be imposed depends in part on the degree of frivolousness of the underlying claim. While the law of the case is that Eastway's claims were frivolous, investigation of the underlying substantive law reveals some support for Eastway's position.

(a) The antitrust claim.

The Court of Appeals' analysis of Eastway's antitrust claim was very brief; it did "not tarry over Eastway's appeal," Eastway I at 249, no doubt because the appellate court thought the frivolousness of the claim obvious. Nonetheless, it is possible to discern three separate points in the Second

Circuit's discussion of the antitrust claim. First, the court seems to suggest that Eastway did not have antitrust standing, because the injury alleged was not "of the type that the antitrust laws are designed to prevent," Eastway I at 250. Second, the court found that Eastway's complaint did not allege a group boycott of a sort that would constitute a per se violation of the antitrust laws, Eastway I at 251 n.5. Finally, the court found that Eastway could not prevail by proving the existence of a group boycott that violated the rule of reason, because 1) even if there had been a conspiracy between the City and the CPC, "such action could not possibly have injured competition. Indeed, Eastway does not even allege anti-competitive effect," Eastway I at 251; and 2) "neither the

City nor CPC stood to gain from inhibition of competition among general contractors," id.

On the antitrust standing issue, the Court of Appeals appears, by citing and quoting Supreme Court decisions on antitrust standing, to be suggesting that Eastway lacks such standing. But Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 521 (1983), one of the opinions quoted by Eastway I, lends some support to plaintiffs' assertion of standing. The Court in Associated noted that "[t]here is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause' and the struggle of federal judges to articulate a precise

test to determine whether a party injured by an antitrust violation may recover treble damages," 459 U.S. at 535-36. The Court further explained that one factor to consider in determining whether the plaintiff has standing "is the directness or indirectness of the asserted injury," 459 U.S. at 540. Since Eastway would have been a direct victim of the alleged conspiracy between the City and the consortium of many banks constituting the CPC, the quoted language arguably could be read to support its claim to standing.

In addition, the very complexity of the law on antitrust standing makes it difficult to say with assurance that any plaintiff's claim to have standing is obviously frivolous. One district court complained: "We must confess at the

outset that we find antitrust standing cases more than a little confusing and certainly beyond our powers of reconciliation." Wilson v. Ringsby Truck Lines, 320 F. Supp. 699, 701 (D. Colo. 1970). See also, e.g., Lobenfeld, Antitrust Standing [in the Second Circuit] - A Somewhat Elusive Target, 51 Brooklyn L. Rev. 525 (1985). Under the circumstances, the court finds that Eastway's claim that it had standing to bring an antitrust claim was not obviously frivolous.

Regarding the question whether Eastway's complaint had made out a per se violation of the antitrust laws, the Court of Appeals listed the cases relied upon by the plaintiffs and then commented in a footnote: "In those and other per se unlawful group boycott cases, the excluded plaintiff was in

competition with some or all of the defendants. The same certainly cannot be said here; neither the City nor CPC competes in any way with any [plaintiff]." Eastway I at 251 n.5. The Second Circuit's characterization of the three cases it listed by name, Silver v. The New York Stock Exchange, 373 U.S. 373 U.S. 341 (1963); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 358 (1961); Klor's Inc. v. Broadway - Hale Stores, Inc., 359 U.S. 207 (1959), is accurate, and the factual distinction between those cases and the instant one is quite real. It is not obvious, however, that the distinction should be dispositive. While the three Supreme Court cases listed did indeed involve situations in which the plaintiff was in competition with at least one of

the alleged conspirators, in none of those cases was that fact stated to be a basis for the decision. Put another way, while the competition in those cases between the plaintiff and at least one defendant was a fact, it was not necessarily a material fact.

Legal scholars have long been troubled by the question of when a group boycott constitutes a per se violation of the antitrust laws as opposed to simply being subject to the "rule of reason." See Bauer, Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe of Reexamination, 79 Colum. L. Rev. 685 (1979). The Court of Appeals' analysis distinguishing between per se and non-per se group boycotts on the basis of the existence or nonexistence of competition between the plaintiff and the defendants

represents a logical attempt to devise simple rules to determine whether claims state a per se cause of action. But it does not represent any fully settled law.

Several circuits have attempted to devise tests for determining the extent of the per se rule. As one commentator has noted, though, "[while] several lower courts have held that the per se rule applies only to certain group boycotts, ... Supreme Court decisions do not contain any such limitations." Bauer, supra, 79 Colum. L. Rev. at 694 (emphasis in original). The Supreme Court has itself noted the attempts by various courts and commentators to provide a workable definition of a group boycott that constitutes a per se violation, and concluded: "We express no opinion,

however, as to the merit of any of these definitions." St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 542 n.14 (1978). For the reasons stated, it is not completely clear that plaintiff's being a competitor of at least one of the parties to a group boycott is a sine qua non of a per se violation.

One Supreme Court decision provides at least some support for the opposite proposition, namely, that a group boycott can constitute a per se violation even when the plaintiff competes with none of the defendants. In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), the plaintiff, a liquor wholesaler, alleged that the defendants, two liquor distillers, had conspired to fix maximum resale prices and had

agreed not to sell liquor to wholesalers who sold liquor for prices above the maximum. The Court first held that the price-fixing agreement was a per se violation of the antitrust laws. Id. at 213. The Court then went on to consider a defense urged upon the Court by the distillers, that they were compelled to fix maximum prices because the wholesalers were conspiring to fix minimum prices. The Court rejected this argument, stating: "Seagram and Calvert acting individually perhaps might have refused to deal with petitioner or with any or all of the Indiana wholesalers. But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers." Id. at 214. The Supreme Court here appears to be viewing the case as a group

boycott case, and arguably seems to be saying, albeit somewhat cryptically, that a group boycott can constitute a per se violation of the antitrust laws even when the plaintiff is not a competitor of any of the defendants.

Although it is unclear whether the Kiefer-Stewart Court really intended an alternate holding based on a group boycott theory, the case has subsequently been cited as a group boycott case. The Supreme Court has itself cited Kiefer-Stewart as a group boycott case in several later group boycott decisions, including Klor's v. Broadway-Hale Stores, 359 U.S. 207, 212 n.5, one of the classic group boycott cases cited in Eastway I. Finally, the Supreme Court has recently commented, without apparent disapproval, on its tendency to treat

Kiefer-Stewart as a group boycott case. See St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 544 n.15 (1978).

Whether or not a concerted refusal to deal is an illegal per se group boycott is, in sum, often difficult to say. As one court recently put it, "A concerted refusal to deal is generally subject to a rule of per se illegality .... However, a confusing array of exceptions and qualifications to this rule have developed, and case law in this area is unsettled." Cha-Car, Inc. v. Calder Race Course, Inc., 752 F.2d 609, 613 (11th Cir. 1985).

Even if the alleged conspiracy did not constitute an illegal boycott per se, it might still have been found illegal under the rule of reason. The Second Circuit found to be frivolous even

Eastway's claim that the boycott was illegal under the rule of reason, because the "conspiracy could not possibly have injured competition. Indeed, Eastway does not even allege anti-competitive effect." Eastway I at 251. The Second Circuit's statement that the conspiracy could not have affected competiton might be subject to factual dispute; nothing in the record indicates that anticompetitive effect was inconceivable. Certainly, the defendants' actions decreased the number of persons who could bid on rehabilitation projects. Furthermore, that Eastway's complaint did not allege anti-competitive effect is immaterial. All a pleading need do, even in antitrust cases, is give notice of the nature of the claim to the opposing side. See George C. Frey Ready-Mixed

Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 553-54 (2d Cir. 1977) ("Even though appellants' claims were alleged with what would ordinarily be considered sufficient specificity, appellees contend ... that antitrust claims, because of their complexity, must be pleaded with greater specificity than other claims. It has been clear in this circuit since Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957) (Clark, C.J.), however, that a short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules"); compare Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972) (where no facts alleged supporting an antitrust conspiracy,

trial judge may, in his discretion, dismiss the claim), with Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 435 (criticizing the holding in Heart Disease as being "worlds away" from Supreme Court precedent).

Finally, although Eastway did not have to allege anticompetitive effect, it in fact did so, although not in its complaint. Paragraph six of Plaintiffs' Statement Pursuant to Local Rule 3(g) claims "[t]hat the defendants' endeavors do have a substantial effect upon competitive conditions within the construction industry in relation to rehabilitation in the metropolitan New York area."

The Court of Appeals also found the rule of reason claim to be frivolous

for a second reason, that "neither the City nor CPC stood to gain from inhibition of competition among general contractors." Eastway I at 251. The Court of Appeals' position appears to be that unless the conspirators intended to improve their position at the expense of the victim of the conspiracy, the victim cannot prevail. But as other courts dealing with similar situations have noted, whether the conspirators intended to improve their positions at the victim's expense in only one of many factors to be considered in a rule of reason analysis. As one court stated:

> The motive which underlies a challenged restraint is but one element in the examination for reasonableness .... Additionally, we should consider the relative, positive and negative effects, the power of the parties in the markets they serve, and

> whether other less restrictive means could be employed to achieve the same desired ends.

Hennessey v. National Collegiate Athletic Association, 564 F.2d 1136, 1153 (5th Cir. 1977) (citation omitted); see also Bridge Corporation of America v. American Contract Bridge League, Inc., 428 F.2d 1365, 1370 (1970), cert. denied, 401 U.S. 940 (1971). The City and CPC dominate the relevant rehabilitation market, the boycott had a devastating effect on Eastway, and less restrictive alternatives may have been feasible. These factors arguably support Eastway's position.

For all of the above reasons, even though we are bound by the Court of Appeals' characterization of frivolousness, we cannot say that Eastway's antitrust claim was more than

marginally frivolous. Many competent attorneys might have believed the claim viable.

(b) The due process claim.

The Court of Appeals found Eastway's due process claim frivolous for two reasons. Eastway I at 249-250. First, the court found that Eastway had not made out a claim for deprivation of "property" without due process of law because Eastway's interest in bidding on contracts did not rise to the level of a constitutionally protected, state-created property interest. Second, the court found that even if Eastway had a property right, the state court Article 78 proceeding had provided Eastway with sufficient process to protect Eastway's rights.

The Second Circuit emphasized that because Eastway had no entitlement to receive future contracts with the City, it possessed no projectable property interest. But the fourteenth amendment protects liberty interests as well as property interests, and several cases have held that government contractors may have a liberty interest in being allowed to bid for new contracts. As one court put it:

> One who has been dealing with the government on an ongoing basis may not be blacklisted, whether by suspension or debarment, without being afforded procedural safeguards including notice of the charges, an opportunity to rebut those charges, and under most circumstances, a hearing .... While the deprivation of the right to bid on government contracts is not a property interest ... the bidder's liberty interest is affected when that denial is based on charges of fraud and dishonesty.

Transco Security Inc. of Ohio v. Freeman, 639 F.2d 318, 321 (6th Cir.), cert. denied, 454 U.S. 820 (1981). Accord, Consent Corp. v. Community Services Administration, 655 F.2d 1291 (D.C. Cir. 1981); Old Dominion Dairy Products v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980).

In addition, a recent Third Circuit case has held that government contractors do have a property right to bid on state contracts. Berlanti v. Bodman, 780 F.2d 296 (3d Cir. 1985), involved a fact pattern remarkably similar to the one in Eastway. The plaintiff Samuel Berlanti, was president of a contracting company named Suffolk County Contractors, Inc. ("Suffolk"). Suffolk was found to have violated New Jersey's Prevailing Wage Act on several state contracts. As a response to

Suffolk's violation of law, the New Jersey Department of Labor debarred both Suffolk and Berlanti from bidding on any public contracts for three years. Belanti brought suit in federal court, claiming that the statute did not give the Commissioner of Labor statutory authorization to pierce the corporate veil and debar Berlanti as an individual, and that his debarment violated his due process rights. The district court dismissed his claim, but the Third Circuit reversed. After analyzing New Jersey law dealing with the entitlements of government contractors, the court concluded "that Berlanti had a property interest in not being arbitrarily debarred." Id. at 300. Because there is caselaw supporting the proposition that government contractors have a liberty

or property interest in the right to bid, we cannot say that Eastway's assertion of constitutionally protected interests was more than marginally frivolous.

By stating that Eastway was in any event afforded sufficient due process by the Article 78 proceeding, the Second Circuit was in effect ruling that Eastway was not entitled to a predeprivation hearing. Entitlement to a predeprivaiton hearing is controlled by the balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976). The general difficulty or predicting the outcome of balancing tests would alone be sufficient to establish that Eastway's claim of entitlement to a predeprivation hearing was not extremely frivolous. In addition, there is the fact that other courts have found postdeprivation

remedies inadequate in similar situations. In Berlanti, for example, the plaintiff had recourse to a state court action similar to an Article 78 proceeding, but the Third Circuit found this not to be dispositive. Rather than relying on the availability of a postdeprivation hearing as grounds for affirming the district court's dismissal of the action, the court remanded to the trial court, and ordered it "to consider whether 'this case falls within the extremely narrow lines reserved for the limited situations where the hearing may properly be postponed until after the deprivation has been effected,'" Berlanti at 301-02, quoting Stana v. School District of the City of Pittsburgh, 775 F.2d 122, 127 (3rd Cir. 1985). See also Old Dominion Dairy Products v. Secretary of Defense, 631

F.2d 953, 967 (D.C. Cir. 1980). ("[W]e hold that subsequent procedures did not satisfy the requirements of due process ....").

One final point in the Court of Appeals' Eastway I opinion deserves mention. In explaining its decision to award attorney's fees under section 1988, the court relied upon Eastway's prior unsuccessful state litigation, commenting:

> [W]e find it particularly noteworthy that Eastway had already challenged the City's policy in the state courts, and had been unsuccessful. These proceedings should at least have put it on notice of the possibility that its adversary might be awarded counsel fees. See Carrion v. Yeshiva University, 535 F.2d 722, 728 (2d Cir. 1976) (upholding an award of attorney's fees to successful defendant in Title VII action, where plaintiff had brought similar claims in a state proceeding and had lost).

Eastway I at 252. The question of what Eastway should have learned from its setback in the state court is an interesting one, reminiscent of the dispute about whether the glass is half full or half empty. Eastway's loss on its state law claim in the Appellate Division certainly put it on notice that its federal claim might fail as well. But its successful motion for summary judgment in the New York Supreme Court also gave Eastway reason to believe that its case had some merit. This, in turn, gave Eastway some grounds to believe that it would not be sanctioned, especially considering Eastway I's definition of "frivolousness" as a case where "it is patently clear that a claim has absolutely no chance of success," Eastway I at 254. The Carrion case relied upon in Eastway I is arguably distinguishable, because plaintiff's state

court action in Carrion failed at both trial and appellate levels.

For all the above reasons, even though it is bound by the Second Circuit's characterization of frivolousness, this court cannot say that Eastway's due process claim was extremely frivolous. Many competent lawyers might have believed this claim to be viable.

(3) Need of Lawyer and Client for Punishment.

Plaintiffs' lead counsel, James LaRossa, is a leading member of the bar. He has been practicing law for nearly 30 years, including 3 years spent as an Assistant United States Attorney in this district. He is admitted to practice before the United States Supreme Court and several Circuit Courts of Appeal. He has lectured numerous times at PLI seminars, state trial lawyer association conferences and at Harvard Law

School. He has published articles of interest to the bar in the areas of evidence and white collar crime and has received the American Academy of Achievement Award as Outstanding Lawyer of the Year and the B'nai Brith National Medal of Honor. He has tried numerous difficult cases in this court and is well respected by the Bench of this district. Such an attorney needs no punishment to induce him to act ethically. Nor is there any showing that plaintiffs have a history of abusing the courts that would support a severe sanction.

(4) Ability to Pay and Need for Compensation.

Neither plaintiffs not plaintiffs' counsel have requested a hearing to present evidence of financial distress. Accordingly, their fiscal status will not be taken into account at this time. Should they wish to do so at a later time, they may make a

motion to reconsider the sanction because of inability to pay. See Oliveri v. Thompson, CV-83-3572 (E.D.N.Y. Nov. 13, 1985) (conditional award of attorney's fees of $51,000, pending a later hearing to determine counsel's ability to pay). There appears to be no reason to believe that this suit has unduly burdened the City or its huge Corporation Counsel's office.

(5) Chilling This Type of Litigation.

Suits of this kind should not be kept out of court by threats of sanctions except in the clearest case of frivolousness. What lies below the surface in real estate litigation of this type against the City is the suspicion of widespread cronyism, favoritism and corruption. Contributions of real estate people to political campaigns are of major importance in New York City and State.

Political connections are worth many millions of dollars in city contracts and other favors. There is no continuing method by which the criminal law, political processes or even the press can police this dangerously explosive combination of politics, money and power. See, e.g., Key Officials Call Scandal Undetectable, N.Y. Times, May 12, 1986, at B1, col. 1; Bronx Development Official Testifies Before Grand Jury, id., May 10, 1986, at 31, col. 5; U.S. Indictment Says a City Aide Got Real-Estate Holing as Bribe, id., May 8, 1986, at A1, col. 2; City Ends Contract for Queens Tower, id., May 14, 1986, at B2, col. 3; Eastway I at 246.

This litigation, had it been permitted to go forward, might have revealed unseemly aspects of the City's real estate transactions, an area long shadowed by charges of favoritism and politicization. Lurking behind the allegations in this suit

were implications of serious misconduct by the City in granting favored--and unfavored--treatment. Under such conditions it becomes dangerous to throttle any avenue to the courts for vindication of rights of private real estate developers.

(C) Allocation of Award of Attorney's Fees

The Second Circuit's mandate to this court on remand was to award attorney's fees for the due process claim against the plaintiffs alone under section 1988, and to award attorney's fees for the antitrust claim against the plaintiffs or their counsel or both under Rule 11. Eastway I at 254; cf. Donaldson v. Clark, No. 85-8270 (11th Cir. Apr. 22, 1986) (awarding attorney's fees to prevailing defendants in a section 1983 action under Rule 11 rather than under section 1988).

If this court were to now impose any attorney's fees against plaintiffs' counsel under Rule 11, it would be necessary to allocate the time spent by the City's counsel between the due process claim and the antitrust claim to ensure that client and counsel are each sanctioned the proper amount. If, on the other hand, the court does not impose any sanctions on plaintiffs' counsel, allocation between causes of action will be unnecessary because the entire sanction can simply be imposed on the client. As a cursory examination of Mr. Barish's and Mr. Woods' time records indicates, and as the City conceded at oral argument, it would be difficult if not impossible to allocate their hours between the two causes of action. The court therefore concludes that, in the interests of efficiency, fairness and policy, the Rule 11 sanctions, as well as

section 1988 sanctions, should be imposed against the plaintiffs alone.

IV. CONCLUSION

In accord with the mandate of the Court of Appeals, attorney's fees must be awarded in this case. Heavy sanctions would be unfair because Eastway I is a case of first impression; there was no reason for plaintiffs or their counsel to have predicted the objective standard Rule 11 ruling of the Court of Appeals. In addition, because the case was brought in good faith, because of the otherwise exemplary conduct of plaintiffs' counsel, because the pleading was only marginally frivolous, and for other reasons set forth in this opinion, attorney's fees in the amount of $1,000, jointly and severally, against plaintiffs Eastway, Jaffee, Kanarek, and Jacobs, are sufficiently punitive.

This award is considerable in light of the nominal $100 sanctions imposed by other courts under similar circumstances. Courts must take care not to use their almost unlimited Rule 11 powers to punish in a vindictive and excessively harsh manner.

So ordered.

Dated: Brooklyn, New York
May 23, 1986

Jack B. Weinstein
Chief Judge, U.S.D.C.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 21, 1985

EASTWAY CONSTRUCTION CORP., GEORGE JAFFEE, IRVING H. KANAREK and ROBERT JACOBS,

Plaintiffs-Appellants-Cross-Appellees,

-against-

THE CITY OF NEW YORK, NATHAN LEVENTHAL, individually and as Deputy Mayor of the City of New York, ANTHONY G. GLIEDMAN, individually and as Commissioner of the New York City Department of Housing Preservation and Development, CHARLES REISS, individually and as Deputy Commissioner of the New York City Office of Development,

Defendants-Appellees-Cross-Appellants,

-and-

THE COMMUNITY PRESERVATION CORPORATION, MICHAEL LAPPIN, individually and as President of the Community Preservation Corporation,

Defendants-Appellees.

Before: KAUFMAN, OAKES and MESKILL,

Circuit Judges.

Eastway appeals from judgment entered on the order of the United States District Court for the Eastern District of New York (Weinstein, C.J.) granting defendants' motions for summary judgment, and dismissing Eastway's complaint, which alleged violations of the antitrust and civil rights laws. Municipal defendants below cross-appeal from the denial of their motion for attorneys' fees pursuant to Fed. R. Civ. P. 11.

Affirmed in part, reversed in part and remanded.

JAMES L. LaROSSA, New York, N.Y. (LaRossa, Cooper, Axenfeld, Mitchell & Bergman, New York, N.Y., Burton S. Cooper, Thomas S. Finegan, Edward M. Chikofsky, of counsel), for Defendants Appellants-Cross-Appellees.

FRED KOLIKOFF, New York, N.Y. (Frederick A. O. Schwarz, Jr., Corporation Counsel of the City of New York, N.Y., Larry A. Sonnenshein, of counsel), for Defendants-Appellees-Cross-Appellants.

DAVID B. TULCHIN, New York, N.Y., (Sullivan & Cromwell, New York, N.Y., Deborah C. Moritz, of counsel), for Defendants-Appellees.

KAUFMAN, Circuit Judge:

We are confronted today with an appeal by a general contracting firm which, frustrated by a series of setbacks, sought vindication and relief in the federal courts. Denied access to redevelopment projects sponsored or approved by the City of New York, it first sought to negotiate an amicable agreement with City officials. When the

negotiations broke down, the contractor filed a petition in the courts of New York State challenging the City's refusal to do business with it. It did not prevail.

Somewhat desperately, perhaps, the contractor brought the instant action in the United States District Court for the Eastern District of New York, charging the City and others with violations of the antitrust and civil rights laws. The defendants below moved successfully for summary judgment, and unsuccessfully for attorneys' fees as a sanction for having brought a frivolous action. We are thus called upon to address the propriety of the district court's dismissal of the claims, as well as its denial of the motion for attorneys' fees. We pause to set forth the relevant facts before turning to the ultimate legal discussion.

I. BACKGROUND

a. Eastway's Dealings With the City

Eastway Construction Corporation ("Eastway") is a general contractor that, for many years, was engaged in the construction of publicly financed housing rehabilitation projects in New York City. The individual plaintiffs below are officers of the corporation.

Between 1966 and 1974, the City of New York ("City"), through its now defunct Municipal Loan Program, loaned a total of nearly twelve million dollars to limited partnerships controlled by various principals of Eastway.[1] The low-interest loans were

---

[1] George Jaffee, one of the plaintiffs below, was a particularly active participant in the Municipal Loan Program. By 1971, he was a principal in corporations and partnerships that had received fourteen loans totaling nearly five million dollars. By 1971, seven firms in which Jaffee was a principal were in arrears in a total amount of $43,949.32.

given to enable the partnerships to rehabilitate thirty-four multiple dwellings in depressed neighborhoods. Eastway served as general contractor on most of the projects.

The majority of the loans, were non-recourse, and were secured by mortgages on the buildings. Eastway was the general contractor on most of the projects. By 1981, the loans were in arrears in the total amount of nearly eight million dollars. And by March 1983, all but three of the buildings that had secured the loans had reverted to City ownership through mortgage foreclosure of in rem taking. The three remaining buildings had mortgage arrears totaling approximately three million dollars.

During the early 1970s, the Municipal Loan Program was rocked by a well-publicized scandal. One City official

was convicted of extortion and accepting bribes and several developers were charged with fraud. Eastway's President, George Jaffee, admitted making payments to the official in charge of the Municipal Loan Program during this period in an attempt to expedite pending loan applications.

In the aftermath of the scandal, New York State revamped its Private Housing Finance Law ("PHFL"), and created the New York City Housing Development Corporation ("HDC"), see N.Y. Priv. Hous. Fin. Law §§ 650-670 (McKinney 1976). Pursuant to the statutory scheme in operation at that time, the City was given supervisory authority over certain redevelopment projects. Specifically, it was empowered to regulate the creation and operation of redevelopment companies formed under Article V of the PHFL, see id. §§ 100-126. Moreover, the City was authorized to control the identities

of the firms with which Article V redevelopment companies contracted, see id. § 112(3).

Still reeling from the Municipal Loan Program scandal, the City decided it would no longer enter into rehabilitation contracts with firms whose principals controlled companies that had defaulted on or were in arrears with respect to loans received from the City. In 1980, the policy was extended to forbid companies under City supervision from entering into contracts with firms that had defaulted or that were in arrears. Because Eastway's principals controlled entities that had defaulted on City loans, Eastway was precluded from contracting with companies that were engaged in City-financed reconstruction projects. In effect, Eastway was put out of business.

In response, Eastway mounted a two-prong attack against the implementation

of the City's policy. First, it initiated an Article 78 proceeding in the New York State Supreme Court, seeking to have the policy declared arbitrary and capricious.[2] Simultaneously, it sought to negotiate a "work out" agreement with the City, pursuant to which it would restructure and reschedule its affiliated companies' debt, in exchange for a promise by the City to approve its involvement in future redevelopment projects.

The legal challenge proved to be unsuccessful. After Eastway prevailed in the Supreme Court, the Appellate Division

---

[2] The state proceeding centered around the City's refusal to approve Eastway as a contractor on a project known as Harlem Gateway NSA 11. Eastway's petition claimed that the City's policy was illegal because the company had proved itself to be a competent contractor; because defaults by related firms had no bearing on its competence; and because it had been denied a hearing.

reversed and dismissed its petition, holding that the City's policy was a proper exercise of its discretion. See Eastway Constr. Corp. v. Gliedman, 86 A.D.2d 575 (1st Dept. 1982). No appeal was perfected to the Court of Appeals,[3] See Eastway Constr. Corp. v. Gliedman, 58 N.Y.2d 972 (1983).

Negotiations on the "work out" agreement proved equally fruitless for Eastway. At one point, the firm and the City did indeed arrive at a tentative agreement, pursuant to which Eastway would pay the City a portion of monies expected to be received on new projects, and the City would not prevent Eastway from participating

---

[3] Eastway claims that an appeal was not taken because it was then attempting to negotiate a "work out" agreement with the City, and was hopeful that it would succeed. It is interesting to note, however, that bargaining was already underway when Eastway filed its petition in the Supreme Court.

in City-supervised ventures. The tentative agreement was never executed by HPD, however, and never went into effect.

b. Eastway's Dealings With CPC

The Community Preservation Corporation ("CPC") is a private consortium of thirty-nine commercial and savings banks that conduct business in New York City. Founded in 1974 for the purpose of facilitating the redevelopment of multiple-family dwellings in depressed neighborhoods, CPC extends low-interest loans to private developers engaged in housing rehabilitation projects. Since its inception, CPC financing has resulted in the creation or rehabilitation of more than 11,000 apartments.

In June 1978, Michael Lappin, then a neighborhood loan officer with CPC, received

an application from Everett Jennings, on behalf of Orange Realty Co., for a loan of $575,000 to be used in the rehabilitation of a building located at 850 St. Marks Avenue in Brooklyn. The application did not name Eastway as general contractor. After consulting with CPC"s President, Lappin rejected the application due to the developer's limited financial resources, as well as questions regarding the bona fides of the property's financial history. Specifically, CPC's internal investigation revealed a questionable relationship between the building's seller-mortgagor and buyer-mortgagee. In fact, George Jaffee's brother-in-law was a principal of each, and this identity of interests raised the spectre that the sale of 850 St. Marks Avenue may not have been an arm's length transaction.

In July 1981, Jennings once more applied to CPC for financing of the

rehabilitation of the St. Marks Avenue property. Again, neither Eastway nor any of its principals was listed as a proposed contractor and, again, CPC rejected the application.

Finally, in 1983, Orange Realty -- this time listing Eastway as general contractor -- applied to Chemical Bank, N.A., and obtained a commitment for one-half of the financing required to rehabilitate the building. The commitment was conditioned upon the agreement of HDC to lend the balance. As it had with other applications by developers naming Eastway as contractor, the City declined to approve the loan. Neither CPC nor Lappin had any involvement with the 1983 application.

c. The District Court Proceedings

By early 1984, Eastway's demise as a general contractor in the public

redevelopment field was nearly complete. The City had declared openly that it would approve no loans to developers using Eastway. That decision had been judicially upheld in connection with the Harlem Gateway NSA II project. And the City had reaffirmed its resolve by rejecting the loan to Orange Realty. Accordingly, on February 3, 1984, Eastway commenced the instant action in the District Court for the Eastern District of New York. Its thirty-six page complaint listed eleven separate causes of action, two of which arose under federal law. Named as defendants were the City of New York, a Deputy Mayor, the Commissioner and a Deputy Commissioner of the New York City Commission on Housing Preservation and Development ("HPD"), CPC, Michael Lappin, Chemical Bank and fifty unidentified "John Does."

In framing its first cause of action, purportedly sounding under Section 1 of the Sherman Act, 15 U.S.C. § 15 (1982), Eastway alleged that the "defendants (except the defendant Chemical Bank, N.A.) ... combined, conspired and confederated for the purpose of injuring the plaintiffs' trade, commerce and business ... by, inter alia, preventing the plaintiffs from gaining the approval necessary to carry on their business in the relevant market." The second cause of action was a broad-ranging civil rights claim, alleging "conduct in violations of Eastway's rights under Article I, Section 10, Article IV, Section 2, and the First, Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution." The nine remaining causes of action alleged violations of state law. In its prayer for relief, Eastway sought an injunction against the City and Chemical

Bank, and money damages totaling nearly one billion dollars.

In April 1984, CPC and Lappin moved to dismiss the complaint for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6) or, alternatively, for summary judgment, pursuant to Fed. R. Civ. P. 56. They also sought to impose sanctions -- including costs and attorneys' fees -- against the plaintiffs and their counsel, pursuant to Fed. R. Civ. P. 11. In a supporting affidavit, Lappin stated that, prior to the commencement of the lawsuit, he had never even heard of Eastway; that his sole contact with Jaffee had been in 1974 or 1975 when, as an employee of HPD, he had rejected a loan application submitted by Jaffee; that he had learned from a City Commissioner of Investigation that Jaffee had been involved in irregularities involving the Municipal Loan Program during the 1970s; and that the City

and CPC had never agreed to refrain from dealing with Eastway or its principals.

During argument on the motion before Chief Judge Weinstein, the court indicated that it did not believe the plaintiffs had made out violations of the antitrust or civil rights law, and was inclined to dismiss. Judge Weinstein further denied Eastway's request for discovery. Not wishing to dispose of the case on a piecemeal basis, however, the court reserved judgment on the motion pending resolution of the case against the municipal defendants.

In June, the City and its officers moved for summary judgment, and also sought attorneys' fees. In their affidavits, the City officials candidly admitted that the City had in fact decided to refrain from doing business with Eastway as a result of its principals' involvement in the Municipal Loan Program. They denied, however, the

allegation that they had encouraged others not to deal with the plaintiffs.

In August 1984, Chief Judge Weinstein held another hearing, at which he considered both the municipal and private defendants' motions for summary judgment. After oral argument, the court granted both motions, finding that there was not "any basis for a civil rights claim," and that "the affidavits and other supporting data [do not] show any violation of the antitrust laws." The judge opined that "the most that has been shown ... is a possible commercial tort which can be adjudicated in the state courts ..." Finally, in response to a request from counsel for the City, the court stated: "No, you are not going to get attorneys' fees in this case. I can't say that this was a frivolous case." Judgment dismissing the action was entered, and Eastway timely filed a notice of appeal. The municipal

defendants in turn filed a cross-appeal from that part of the judgment denying their motion for attorneys' fees.

II. DISCUSSION

a. Eastway's Appeal

We need not tarry over Eastway's appeal from the decision of the district court granting summary judgment against it and dismissing its complaint.

We have long recognized that summary judgment is a "drastic device, since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury." Heyman v. Commerce & Industry Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975). Accordingly, the moving party bears heavy burden of demonstrating the absence of any material issues of fact, Patrick v. LeFevre, 745 F.2d 153, 158 (2d Cir. 1984); see Adickes v. H.S. Kress & Co., 398 U.S.

144, 157 (1970). Moreover, in reviewing a Rule 56 motion, a district court must resolve all ambiguities and draw all reasonable inferences in favor of the party defending against the motion, id.; see United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). If, in this generous light, a material issue is found to exist, summary judgment is improper, and the case must proceed to trial, see Schering Corp. v. Home Ins. Co., 712 F.2d 4, 9 (2d Cir. 1983); United States v. One Tintoretto Painting Entitled "The Holy Family with Saint Catherine and Honored Donor", 691 F.2d 603, 606 (2d Cir. 1982).

Turning to the other side of the Rule 56 equation, we have recently stressed the importance of the materiality element in deciding motions for summary judgment, see Quarles v. General Motors Corp., No. 84-7975, slip op. at 2775 (2d Cir. 1985).

"[T]he mere existence of factual issues -- where those issues are not material to the claims before the court -- will not suffice to defeat a motion for summary judgment." Id. at 2777. Moreover, in opposing a motion, a party may not rest upon mere conclusory allegations or denials, see Schering, supra, at 9; Fed. R. Civ. P. 56(e). Rather, it is incumbent upon a defending party to set forth "supporting arguments or facts in opposition to the motion." SEC v. Research Automation Corp., 585 F.2d 31, 31 (2d Cir. 1978).

1. The Civil Rights Claim

In light of the standards we have enunciated, it is manifest that Eastway's self-styled "civil rights" claim was properly dismissed. Eastway simply claims that the City has refused to allow it to participate in City-sponsered or City-supervised

redevelopment projects. The City readily admits to this fact, and points as justification for its policy to the involvement by Eastway's principals in certain malefactions stemming from the Municipal Loan Program of the 1970s. The sole question, then becomes one of law -- namely, whether the City's refusal amounts to a violation of Eastway's civil rights.

Eastway's claim purports to sound under 42 U.S.C. § 1983 (1982), which provides a remedy to those who, as a result of state action, suffer a deprivation of "rights, privileges or immunities secured by the Constitution and laws of the United States." It is axiomatic that a successful § 1983 claim requires more than a showing that one has been wronged at the hands of a state or municipal official. Rather, a plaintiff must allege that he has been deprived of some right secured by federal

statute or the United States Constitution. See Baker v. McCollan, 443 U.S. 137, 140 (1979).

Yet, nowhere does Eastway allege a deprivation of any federally secured right. If the reference in the complaint to the fourteenth amendment is meant to suggest that the City's actions amount to a deprivation of property without due process, such a claim cannot succeed, for Eastway's involvement in publicly-financed projects does not rise to the level of a property interest. The Supreme Court has stated: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Certainly, Eastway desired -- and perhaps even needed

or expected -- to continue acting as a general contractor on public redevelopment projects. But it fails to point to a single constitutional, statutory or contractual provision that would entitle it to do so. And absent any such right, its claim that the City's actions violate § 1983 is incorrect as a matter of law.

Although it did not argue this point in the district court, Eastway now urges that it was deprived of the "right to have the City rule upon its application for project approval and financing in both a timely and impartial manner." Even if we were to hold that such a property right exists -- and we do not do so -- it cannot be said that Eastway was deprived of its property without due process of law. The Article 78 proceeding in New York's state courts constituted due process sufficient to protect Eastway's claimed property interest in a fair and impartial

review of its application.[4] See Parratt v. Taylor, 451 U.S. 527, 543-44 (1981).

Accordingly, the district court's dismissal of the civil rights claim was proper and, indeed, mandated. Although Judge Weinstein relied on the affidavits submitted in support of the Rule 56 motion, and thus granted summary judgment, we believe it would have been equally proper to dismiss the civil rights count for failure to state a claim, pursuant to Rule 12(b)(6).

2. The Antitrust Claim

Although Eastway's antitrust count is superficially more complex than the civil

---

[4] In light of our holding that Eastway failed to make out a viable claim pursuant to § 1983, we need not address the appellees' argument that Eastway is collaterally estopped to relitigate that claim because it was the basis of the prior Article 78 proceeding.

rights claim, it does not raise a colorable federal issue, and was also properly dismissed below.

We note at the outset that, although Eastway seeks to argue that the City and CPC engaged in concerted action aimed at excluding it from the publicly-financed redevelopment market, it alleges no facts from which the inference may be drawn that the appellees in fact did so. Neither CPC nor Lappin are even mentioned in that part of the complaint that seeks to allege an antitrust violation. Any purported connection between CPC and Eastway appears exceedingly tenuous at best. Indeed, it is undisputed that CPC never received a loan application on which any plaintiff was listed as contractor. CPC and Lappin may simply have been added as defendants because Eastway, knowing that the City could not be deemed to conspire with itself for the

purposes of Section 1 of the Sherman Act, needed to find some other "conspirator."

We need not dwell, however, on the paucity of factual support for the Section 1 count. For, even assuming that such support could be found in the record, Eastway's complaint wholly fails to make out a viable claim under the antitrust laws.

The Supreme Court has clearly established that a plaintiff has standing to assert an antitrust claim only where the injury alleged is of the type that the antitrust laws are designed to prevent. Associated General Contractors of California, Inc., v. California State Council, Inc., ___ U.S. ___, ___, 103 S. Ct. 897, 909-10 (1983); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). It is not enough that a plaintiff alleges that it is "in a worse position than [it] would have been had [defendants] not committed [the

acts complained of]." Brunswick, supra, at 486. Such a minimal requirement would "divorce[] antitrust recovery from the purposes of the antitrust laws," "which 'were enacted for the protection of competition, not competitors.'" Id. at 487-88 (quoting). Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

Mindful of these standards, it is clear that Eastway has altogether failed to allege a valid antitrust claim. Even if Eastway was excluded from the relevant market, and even if its exclusion was the result of a "contract, combination or conspiracy" between the City and CPC, such action could not possibly have injured competition. Indeed, Eastway does not even allege

anti-competitive effect.[5] In plain fact, neither the City nor CPC in their roles as mortgage lenders stood to gain from the inhibition of competition among general contractor.

If Eastway's antitrust complaint were deemed to state a claim, every joint decision to hire one contractor over another -- whether based on reputation, price, past performance, etc. -- would be assailable under the Sherman Act. Although in each

---

[5] The case before us is instantly distinguishable from those (cited by Eastway) where no allegation of anti-competitive effect is necessary. See, e.g., Silver v. The New York Stock Exchange, 373 U.S. 341 (1963); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). In those and other per se unlawful group boycott cases, the excluded plaintiff was in competition with some or all of the defendants. The same certainly cannot be said here; neither the City nor CPC competes in any way with any defendant.

such case the rejected contractor would undoubtedly be unhappy, such a result would pervert the intent of those who drafted the antitrust laws.

There were simply no genuine issues of material fact to be resolved before the district court. Accordingly, Judge Weinstein was correct in dismissing -- indeed, he had not alternative but to dismiss -- Eastway's antitrust claim. As was true of the § 1983 claim, it might just as easily have been dismissed to Rule (12(b)(6).

3. Denial of Eastway's Discovery Request

In light of our foregoing conclusions, it should come as no surprise that we affirm Judge Weintein's decision to deny Eastway's request for discovery. We have held that, "[w]here a plaintiff fails to produce any specific facts whatsoever to support a conspiracy allegation, a district court may,

in its discretion, refuse to permit discovery and grant summary judgment." Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2d Cir. 1981). A bare assertion that evidence to support a fanciful allegation lies within the exclusive control of the defendants, and can be obtained only through discovery, is not sufficient to defeat a motion for summary judgment. Id.; see Donnelly v. Guion, 467 F.2d 290, 293 (2d Cir. 1973); United States v. Donlon, 355 F. Supp. 220, 225 (D. Del.), aff'd, 487 F.2d 1395 (3d Cir. 1973).

Such was the case here. As in Contemporary Mission, supra, 648 F.2d at 107, "defendants produced affidavits setting forth reasonable grounds for their actions and, in addition, attested that they had acted in good faith. The plaintiff responded by presenting immaterial factual inconsistencies and be reiterating its

conclusory allegations of conspiracy." In such a setting, the district court acted well within its discretion in granting summary judgment without affording Eastway the opportunity to vex the various defendants yet further.

Accordingly, the grant of both the municipal and private defendants' motions for summary judgment, and the denial of Eastway's request for discovery are affirmed.

b. The City's Cross-Appeal

Both groups of defendants sought attorneys' fees in the district court. Although the action was dismissed from the bench, Judge Weinstein denied the requests for fees, stating: "I can't say this was a frivolous case." The municipal defendants now cross-appeal from that portion of the judgment denying fees, arguing that the

denial was an abuse of the district courts' discretion.

Under the traditional "American Rule" governing allocation of the costs of litigation, the parties pay for their respective counsel's fees, regardless of the outcome of the action. See Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). In recent years, however, Congress has engaged a number of statutory exceptions to the general rule, which allow fees to be shifted to the prevailing party. Certain of these statutes mandate that fees be awarded, see e.g., 15 U.S.C. § 15 (Clayton Act); 29 U.S.C. § 216(b) (Fair Labor Standards Act of 1938, as amended); 7 U.S.C. § 210(f) (Packers and Stockyards Act). Others make awards discretionary, but limit them to prevailing plaintiffs, see e.g., 5 U.S.C. § 5521(g)(2)(B) (Privacy Act of 1974); 42 U.S.C. § 3612(c) (Fair

Housing Act of 1968). The majority of these provisions are more flexible, allowing fees to be awarded to either plaintiff or defendant, and entrusting courts with the effectuation of the underlying policy.

Notable among the fee shifting provisions is The Civil Rights Attorneys' Fees Act of 1976, codified at 42 U.S.C. § 1988 (1982). Section 1988 provides that, "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." In construing a similarly worded fee statute, see 42 U.S.C. § 2000-3(b) (1976), the Supreme Court has held that a district court may award attorneys' fees to a prevailing defendant only where it finds "that the plaintiff's action was frivolous, unreasonable,

or without foundation, even though not brought in subjective bad faith." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). In a slightly modified rearticulation of that standard, the Court held that "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Id. at 422. The same standard was applied to 42 U.S.C. § 1988 two years later in Hughes v. Rowe, 449 U.S. 5, 15 (1980), and has been followed in this Circuit since. See Harbulak v. County of Suffolk, 654 F.2d 194 (2d Cir. 1981); see also Prate v. Freedman, 583 F.2d 42 (2d Cir. 1978) (reversing a denial of fees to defendants in Title VII action).

We have already expounded upon our views regarding Eastway's § 1983 claim, and

are impelled to the conclusion that it was "unreasonable and groundless, if not frivolous," Harbulak, supra, 654 F.2d at 198, within the meaning of the standard set forth by the Supreme Court. Eastway could not point to a deprivation of any single right conferred by federal law or the United States Constitution, yet it "continued to litigate through to summary judgment," id.

In addressing the issue of attorneys' fees, we find it particularly noteworthy that Eastway had already challenged the City's policy in the state courts, and had been unsuccessful. These proceedings should at least have put it on notice of the possibility that its adversary might be awarded counsel fees. See Carrion v. Yeshiva University, 535 F.2d 722, 728 (2d Cir. 1976) (upholding award of attorney's fees to successful defendant in Title VII action, where plaintiff

had brought similar claims in state proceeding and has lost).

Accordingly, in light of all the circumstances surrounding this troublesome litigation, we hold that Judge Weinstein erred in denying the municipal defendants' motion for attorneys' fees incurred in defending against Eastway's cause of action alleging a violation of its civil rights.

Apart from the statutory provisions allowing for the shifting of litigation costs, a federal court may award attorneys' fees pursuant to its inherent equitable powers, or pursuant to the dictates of Fed. R. Civ. P. 11. When acting within its equitable powers, costs may be awarded to a prevailing party only where the unsuccessful litigant has been found to have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Alyeska Pipeline, supra, 421 U.S. at 258-59 (quoting F.D. Rich Co. v.

United States ex rel. Industrial Lumber Co., 417 U.S. 116, 129 (1974). In Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078 (2d Cir. 1977), this Circuit held that there must be "clear evidence" that the claims are "entirely without color and made for reasons or harassment or delay or for other improper purposes." Id. at 1088; see Nemeroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980).

Rule 11, however, provides a somewhat more expansive standard for the imposition of attorneys' fees, see Abraham v. United States, 582 F. Supp 257 (S.D.N.Y. 1984). In pertinent part, Fed. R. Civ. P. 11 states:

> The signature of an attorney or party constitutes a certificate by him that the he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well

> grounded in fact and is warranted by existing law or a good faith argument for the extension, modificaton, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The language of the rule, which was amended in 1983, provides a striking contrast to the words of its predecessor.[6] Prior to the 1983 amendment, the rule spoke in plainly subjective terms: An attorney's certification of a pleading was an assertion that "to the best of his knowledge, information, and belief, there [was] good

---

[6] Before the 1983 amendment, Rule 11 provided in pertinent part:

> The signature of an attorney [on a pleading] constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

ground to support it." The rule, therefore, contemplated sanctions only where there was a showing of bad faith, Nemeroff, supra, 620 F.2d at 348, and the only proper inquiry was the subjective belief of the attorney at the time of the pleading was signed.

The addition of the words "formed after a reasonable inquiry" demand that we revise our inquiry. See Schwarzer, Sanctions Under the New Federal Rule 11 -- A Closer Look, 104 F.R.D. 181 (1985). No longer is it enough for an attorney to claim that he acted in good faith, or that he personally was unaware of the groundless nature of an argument or claim. For the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.

The notes of the Advisory Committee on Rules appear to support this expanded reading of the rule. The Committee was frank in admitting that, "in practice Rule 11 has not been effective in deterring abuses." See also 6 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1971). Thus, the drafters speak of the amended rule as an attempt to "build[] upon and expand[]" the equitable doctrine. To this end, they state, the new language is "intended to reduce the reluctance of courts to impose sanctions... by emphasizing the responsibilities of the attorney" (emphasis added). Finally, the drafters make absolutely clear that the standard is more stringent than the original good faith formula set forth in Nemeroff, supra.

In light of the express intent of the drafters of the new Rule 11, and the clear policy concerns underlying its amendment,

we hold that a showing of subjective bad faith is no longer required to trigger the sanctions imposed by the rule. Rather, sanctions shall be imposed[7] against an

---

[7] By employing the imperative "shall," we believe the drafters intended to stress the mandatory nature of the imposition of sanctions pursuant to the rule. Unlike the statutory provisions that vest the district court with "discretion" to award fees, Rule 11 is clearly phrased as a directive. Accordingly, where strictures of the rule have been transgressed, it is incumbent upon the district court to fashion proper sanctions.

A natural concomitant of a mandatory imposition of sanctions is a broadened scope of review by the Court of Appeals. Where the only question on appeal becomes whether, in fact, a pleading was groundless, we are in as good a position to determine the answer and, thus, we need not defer to the lower court's opinion.

At the same time, however, we note that the district courts retain broad discretion in fashioning sanctions, and apportioning fees between attorney and client. The commentary to Rule 11 sets forth a number of the factors that will be examined in arriving at an appropriate award, and in determining by whom any

(Footnote Continued)

attorney and/or his client when it appears that a pleading has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law of a good faith argument for the extension, modification or reversal of existing law.

In framing this standard, we do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the

---

(Footnote Continued)
costs will be borne. In reviewing the specifics of an award of attorneys' fees, therefore, we shall continue to adhere to the "abuse of discretion" standard.

common law itself. Courts must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer. But where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated. Such a construction serves to punish only those who would manipulate the federal court system for ends inimicable to those for which it was created. See Schwarzer, supra, at 182.

Returning to the facts of this appeal, we cannot say for a certainty that Eastway or its counsel acted in subjective bad faith in bringing or maintaining this lawsuit, or that its actual motive was to harass the City. After its travails of the preceding

decade, it might just as well have been acting out of frustration or desperation. We can say, however, that its claim of an antitrust violation by non-competitors, without any allegation of an antitrust injury, was destined to fail. Moreover, a competent attorney, after reasonable inquiry, would have to reach the same conclusion.

Accordingly, we hold that it was error for the district court to deny the municipal defendants' motion for attorneys' fees incurred in defending against the antitrust claim. On remand, the district court shall impose appropriate sanctions against the appellants-cross-appellees, their counsel or both, which shall include an order to pay the municipal defendants the amount of the reasonable expenses incurred by them in defending the antitrust claim, including a reasonable attorney's fee.

III. CONCLUSION

The judgment of the district court dismissing Eastway's claims in their entirety is affirmed. That portion of the judgment denying the municipal defendants' motion for attorneys' fees is reversed. The cause is remanded to the district court for further proceedings in conformity with this opinion. Costs to appellees.

AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED DECEMBER 29, 1984.

EASTWAY CONSTRUCTION CORP., GEORGE JAFFEE, IRVING H. KANAREK and ROBERT JACOBS,

Plaintiffs,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

The judgment of August 9, 1984, as amended on August 27, 1984, is hereby amended nunc pro tunc to read as follows:

This case having come on to be heard before Honorable Jack B. Weinstein, United States District Judge, on August 7, 1984, and defendants' motions for summary judgment having been granted and defendants' motions for attorneys' fees having been denied for the reasons stated on

the record in open court, and defendants having waived an award of costs and disbursements, it is

ORDERED and ADJUDGED that the plaintiffs take nothing of the defendants; that the defendants take nothing of the plaintiffs; that defendants' motions for summary judgment are granted for the reasons stated on the record in open court; and that defendants' motions for attorneys' fees are denied for the reasons stated on the record in open court.

Jack B. Weinstein
JACK B. WEINSTEIN,
U.S.D.J.

Dated: Brooklyn, New York
12/29/84

ORAL DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED AUGUST 7, 1984.

EASTWAY CONSTRUCTION CORP., et al.,

Plaintiffs,

-versus-

THE CITY OF NEW YORK, et al.,

Defendants.

United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

August 7, 1984
9:30 o'clock A.M.

B e f o r e :

HONORABLE JACK B. WEINSTEIN,

U.S. Chief Judge.

A P P E A R A N C E S :

Messrs. LA ROSSA, AXENFELD & MITCHELL
Attorneys for the Plaintiffs
41 Madison Avenue
New York, New York 10010

By: JAMES LA ROSSA, ESQ.
-and-
THOMAS S. FINEGAN, ESQ., P.C.
Of Counsel.

CORPORATION COUNSEL OF THE CITY OF NEW YORK

For the Defendant City of New York

100 Church Street - R. 310B
New York, New York 10007

By: WILLIAM L. BARISH, ESQ.
Assistant Corporation Counsel

Messrs. SULLIVAN & CROMWELL
Attorneys for Defts. CPC & Michael Lappin

325 Broad Street
New York, N.Y. 10004

By: DAVID TULCHIN, ESQ.
Of Counsel.

THE COURT: It's a very difficult and interesting case. I think it is fairly clear that the plaintiffs have made out a case showing that the City has been quite unfair to them. But that doesn't constitute a basis for exercising federal jurisdiction here.

I do not see any basis for a civil rights claim. It is true that Lappin and the Community Preservation Corporation were acting in part as perhaps agents for the City. But that their actions do not, based on the complaint and other affidavits in the record, show any violation of constitutional or statutory rights by any of the defendants.

I do not think that the affidavits and other supporting data show any violation of any of the federal antitrust laws. The most that has been shown here, it seems to me, is a possible commercial tort which can be

adjudicated in the state courts or a basis for an Article 78 proceeding in the state courts.

I don't rest my decision on the collateral estoppel point because it doesn't seem to me that the issues here raised, were raised in the state court. It is arguable that they were. But under the circumstances, I think collateral estoppel is predicated in some sense on a fair opportunity to raise the issue. And I do not think that you can say on the summary judgment that there was that opportunity here.

In short, although there may be continuing unfairness, I do not believe that this is a federal issue.

Accordingly, the case is dismissed on the motion for summary judgment and also on the basis of a failure to state a claim.

Costs and disbursements to both defendants.

Is there anything else you want me to find at this time?

MR. TULCHIN: Your Honor, I take it from your last comment that you are also basing a decision on the complaint's failure to state a claim.

THE COURT: Yes. But the parties are to supplement by affidavits and the like. I am placing it explicitly also on the summary judgment ground because I don't want the case reversed on the ground that the complaint should be amended. I think the Court of Appeals will now have the factual predicate for a final decision. If I am to try it, I will be happy to try it. If I am not, we are going to get rid of it. I don't want a lot of pleading motions and appeals. That doesn't seem to me to be too useful.

Are you going to seek costs and disbursements? They are not very much.

If you don't we can enter a judgment and move the case forward. Otherwise it will just drag on a little longer.

MR. TULCHIN: I am happy to have the judgment entered, your Honor, without seeking costs.

MR BARISH: I would agree, your Honor, save a request for attorneys' fees.

THE COURT: No, you are not going to get attorneys' fees in the case. I can't say that this was a frivolous case.

The clerk will enter a judgment of dismissal today. You can take your appeal then promptly.

Anything further?

MR. LA ROSSA: I don't think so, your Honor.

THE COURT: Thank you very much, gentlemen. It was a very interesting argument.

Enjoy your summer.

MR. TULCHIN: You too, your Honor, thank you.

Supreme Court, U.S.
FILED
SEP 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE CITY OF NEW YORK, et al.,

Petitioners,

vs.

EASTWAY CONSTRUCTION CORP., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAROSSA, MITCHELL & ROSS
Attorneys for Respondents
41 Madison Avenue
New York, New York 10010
(212) 696-9700

JAMES M. LAROSSA
JOHN W. MITCHELL
KAREN F. SILVERMAN
Of Counsel

TABLE OF CONTENTS

		Page
I.	TABLE OF CASES AND AUTHORITIES	iv
II.	REASONS FOR NOT GRANTING THE WRIT	1
III.	ARGUMENT	12
	A. The Second Circuit's Decision, That District Courts Have Discretion To Award Attorneys Fees Under 42 U.S.C. § 1988 And Fed.R.Civ.P. 11 In An Amount Below The Lodestar Figure, Should Not Be Reviewed On Certiorari	12
	B. The Second Circuit's Decision That It Is Within The Court's Discretion To Reduce The Amount Of A Fee Award Below The Lodestar Is Consistent With Decisions of the Fourth And Seventh Circuits, As Well As A Prior Decision Of The Second Circuit	13
	C. The Second Circuit's Decision Is In Harmony With This Court's Decisions On The Amount Of An Award Of Attorneys Fees	26

Page

D. The Second Circuit's Decision, Far From Creating Confusion And Uncertainty Actually Provides The District Courts With Guideposts To Follow In Determining The Amount Of An Appropriate Fee Award In A Given Case 31

E. CONCLUSION 35

TABLE OF CASES AND AUTHORITIES

Page

Arnold v. Burger King, 719 F.2d 63 (4th Cir.), cert. denied, 469 U.S. 826 (1983) ..... Passim

Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541 (1984) ..... Passim

Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980) 19

Cleveland Demolition Co., Inc. v. Azcon Scrap Corp., Nos.86-114(L), 86-1266 (4th Cir. Sept. 4, 1987) (Available on LEXIS) ..... Passim

Faraci v. Hickey-Freeman Co., 607 F.2d 1025 (2d Cir. 1979) .... Passim

Ford v. Temple Hospital, 790 F.2d 342, 349 (3d Cir. 1986) 3

Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1983) 27,28

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) ..... Passim

Munson v. Friske, 754 F.2d 683 [7th Cir. 1985] .... Passim

Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980) 17

Page

National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 96 S.Ct. 2778 (1976) 31

Nixon v. Individual Head of St. Joseph Mortg. Co., 612 F.Supp. 253 (D.C.Ind. 1985), aff'd, 787 F.2d 595 (7th Cir. 1986) 18

Pennsylvania v. Delaware Valley Citizen's Council, ____ U.S. ____, 106 S.Ct. 3088 (1986); Pennsylvania v. Delaware Valley Citizens' Council, ____ U.S. ____, 107 S.Ct. 3078 (1978) .. 29,30

Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987) 18,19

Waters v. Wisconsin Steelworks, 502 F.2d 1039, 1322 (7th Cir. 1974), cert. denied, 425 U.S. 997, 96 Ct. 2214 (1976) 17

Statutes Cited

42 U.S.C. § 1988 ..... Passim

Rule 11, (Fed.R.Civ.P.) ..... Passim

Other Authorities Cited

Advisory Committee Notes To Rule 11 ..... Passim

II. REASONS FOR NOT GRANTING THE WRIT

As indicated in the petition filed by the City, this case involves the issue of whether the district court, and subsequently the United States Court of Appeals for the Second Circuit, abused their discretion in fashioning what those courts found were appropriate sanctions under both Rule 11 of the FRCP and 42 U.S.C. § 1988.

Self-evidently dissatisfied with the amount which was ultimately awarded by the Court of Appeals, the petitioners now ask this Court to promulgate an immutable rule that would divest the district courts of any discretion in deciding the nature and magnitude of any sanction imposed under either the Civil Rights Act (42 U.S.C. § 1988) or Rule 11, (Fed.R.Civ.P.). Indeed, the City argues that the only function which a

district court should serve in the imposition of sanctions under these sections should be reduced to the mere mathematical calculation of hours spent and rates charged.

It is respectfully asserted that it would be entirely inappropriate for this Court to adopt the position urged by the City. Self-evidently, the issue of sanctions and their appropriate nature and scope are a matter uniquely suited to the sound discretion of the district courts. Vesting substantial autonomy in the district courts to fashion the nature and magnitude of any sanction serves many salutory principles.

First, as the Advisory Committee to Rule 11 noted, it is the district court that is in the best position to "tailor sanctions to the particular facts of the case with which it [the district court] should be well acquainted." See

Advisory Committee Notes to Rule 11. Vesting such autonomy in the district court also serves the goal, similarly recognized by the Advisory Committee, of insuring that the district courts "retain the necessary flexibility to deal appropriately with violations of the Rule."

Moreover, in a system in which it is the district court that tailors the nature and scope of the sanction to the circumstances of a particular case, the risk that too severe sanctions or sanctions too quickly imposed will have unintended adverse consequences is greatly reduced. As the Court in Ford v. Temple Hospital, 790 F.2d 342, 349 (3d Cir. 1986) observed:

> The uncritical imposition of attorney's fees can have an undesirable chilling effect on an attorney's legitimate ethical obligations to represent his client zealously. Judge Weinfeld captures the heart of

> the issue when stating: The power to assess the fees against an attorney should be exercised with restraint least the prospect thereof till the order of proper and forceful advocacy on behalf of his client. Colucci v. New York Times Co., 553 F.Supp. 1011, 1014 (S.D.N.Y. 1982)."

In the instant case, on remand to the district court, Judge Weinstein in a thoughtful opinion explored the various criteria which should be evaluated by a district court judge in considering the kind of sanction and the amount of fees to be imposed. The Court described seven separate factors which it relied upon in making its determination. (A81-101) These included: (1) subjective factors-generally (2) subjective factors-vindictiveness and desire to punish opponent (3) first offenders and others of good repute (4) ability to pay (5) need for compensation (6) degree of frivolousness

(7) importance of not discouraging particular types of litigation.

Comparing these factors to the underlying circumstances of the case, District Court Judge Weinstein made the following observations. With respect to the first factor, Judge Weinstein found that "there [was] no evidence or reason to believe that plaintiffs or their attorneys did not bring this action in good faith for the purpose of obtaining the relief they sought." (A110)

Regarding the factor concerning the frivolousness of the complaint, the Court noted that "though we are bound by the Court of Appeals characterization of frivolousness, we cannot say that Eastway's antitrust claim was more than marginally frivolous. Many competent lawyers might have believed the claim viable." (A127-28)

Addressing plaintiffs due process

civil rights cause of action, the Court observed that, "because there is case law supporting the proposition that government contractors have a liberty or property interest in the right to bid, we cannot say that Eastway's assertion of constitutionally protected interest was more than marginally frivolous." (A131-32) Once again the Court observed that "many competent lawyers might have believed this claim [as well] to be viable." (A136)

On the question of the factor considering the need of lawyer or client punishment, the Court found that the plaintiffs' lead counsel was a "leading member of the bar" . . . [who] has been practising law for nearly thirty (30) years, including three (3) years spent as an Assistant United States Attorney in this district." (A136) The Court noted that "he has tried numerous

difficult cases in this court and is well respected by the Bench of this district. Such an attorney needs no punishment to adduce him to act ethically. Nor is there any showing that plaintiffs' have a history of abusing the courts that support a severe sanction." (137)

On the issue of the ability to pay, the Court pointed out that no hearing had been held with respect to the financial ability of either the lawyers or the clients. However, the Court did observe that "there appears to be no reason to believe that this suit has burdened the City or its huge Corporation Counsel's office." (A138)

Finally, with respect to the factor which considers the potential that a sanction may have for "chilling this type of litigation" the Court found that "this litigation, had it been permitted

to go forward, might have revealed unseemly aspects of the City's real estate transactions, an area long shadowed by charges of favoritism and politicization. Lurking behind the allegations in this suit were implications of serious misconduct by the City in granting favored -- and unfavored -- treatment. Under such conditions it becomes dangerous to throttle any avenue to the courts for vindication of rights of private real estate developers." (A139-40)

As a result, in its final analysis, the district court found that "because the case was brought in good faith, because of the otherwise exemplary conduct of plaintiffs' counsel, because the pleading was only marginally frivolous, and for the other reasons set forth in this opinion, attorneys fees in the

amount of $1,000 . . . are sufficiently punitive." (A142)

On appeal from the decision of Judge Weinstein on remand, the Second Circuit agreed that the lower court had "thoughtfully considered a variety of factors bearing on the appropriate amount of a fee to be awarded as a sanction." (A11) Further, the Court, reviewing under the "abuse of discretion standard," expressed its opinion that "we agree with his [Judge Weinstein's] general conclusion that a fee substantially less than the lodestar amount is permissible." (A11)

The facts of this case demonstrate quite clearly why the mathematical formulation urged by the City should be rejected. As the lower court specifically found, and the Court of Appeals confirmed, this was not an instance in which reckless, vindictive or

abusive litigation was brought in an effort to harass or punish the defendant. Rather, it was a case in which "competent lawyers" in good faith could have disagreed as to viability of the anti-trust and Civil Rights causes of action. Moreover, as the district court conceded, had the suit been permitted to go forward, it might well have ultimately revealed "serious misconduct by the City in granting favored - and unfavored treatment." It would seem manifestly unfair to treat this case the same as a case which was brought in subjective bad faith or for improper purposes. Nevertheless, the City urges that this Court divest the district courts of any power to adjust or regulate the appropriate remediation and sanction and simply to compel them only to undertake the mathematical computation of hours spent and rate charged.

It is respectfully asserted that the sanctions permitted both by 42 U.S.C. § 1988 as well as by Rule 11 of the Federal Rules of Civil Procedure were intended by the Legislature to be applied with reason and through the sound discretion of the district court judges. To adopt the City's position that the application of the "lodestar" amount is the only permissible disposition in any instance where a sanction is to be imposed, would be counter-productive to our present system. For these reasons, the petition for a Writ of Certiorari should be denied.

ARGUMENT

A. The Second Circuit's Decision, That District Courts Have Discretion To Award Attorneys Fees Under 42 U.S.C. § 1988 And Fed.R.Civ.P. 11 In An Amount Below The Lodestar Figure, Should Not Be Reviewed On Certiorari.

As a corollary to the principle that the district courts are vested with broad discretion in fixing the amount of a "reasonable" attorney's fee, the United States Court of Appeals for the Second Circuit held in this case that the district judge had discretion to award a fee which was less than the full lodestar amount. Contrary to the arguments advanced by petitioners before this Court, this decision is consistent with decisions of the United States Court of Appeals for the Fourth Circuit and the Seventh Circuit, and with prior Second Circuit case law. Moreover, the decision of the majority in this case is wholly in

accord with prior decisions of this Court. Finally, the petitioners' claim that the Second Circuit's decision will create uncertainty and confusion is unfounded. Accordingly, there are no "special and important reasons" to review the Second Circuit's decision in this case, and thus, pursuant to Rule 17 of the Rules of this Court, this last-ditch effort on the part of the petitioners to obtain a greater fee award should be rejected.

B. The Second Circuit's Decision That It Is Within The Court's Discretion To Reduce The Amount Of A Fee Award Below The Lodestar Is Consistent With Decisions Of The Fourth And Seventh Circuits, As Well As A Prior Decision Of The Second Circuit.

The position of the City of New York throughout this litigation has been that the district courts have no discretion to award attorneys fees in an amount which is anything less than the full lodestar. Indeed, it is the

City's view that the district court's function is essentially a mathematical one, focusing exclusively upon the calculation of hours spent and the hourly rate to be applied, and virtually ignoring all other considerations which are relevant to determining what fee is "reasonable" under the circumstances of a given case. In petitioning this Court for certiorari, the City first claims that in upholding a fee award which is less than the lodestar, the Second Circuit's decision is in conflict with the decisions of two other federal appellate courts (Munson v. Friske, 754 F.2d 683 [7th Cir. 1985] and Arnold v. Burger King Corp., 719 F.2d 63 [4th Cir.], cert. denied, 469 U.S. 826 [1983]), and is at odds with a prior decision of the Second Circuit itself (Faraci v. Hickey-Freeman Co., 607 F.2d 1025 [2d Cir. 1979]). Of

course, as is fully established below, petitioners are totally in error.

Petitioners cite Munson, Arnold and Faraci for the proposition that a district court may only award a fee which is below the lodestar if there is evidence that the plaintiff is financially unable to pay the full lodestar amount. This represents a serious mischaracterization of the decisions in those cases. Moreover, as is fully established below, the positions adopted by the Court of Appeals for the Fourth and Seventh Circuits with respect to the amount of attorneys fees are in full accord with that of the Second Circuit.

In the first case relied upon by the City in their petition, Munson, supra, the United States Court of Appeals for the Seventh Circuit specifically pointed out at the outset that

district courts have wide latitude in setting the amount of fees awarded. 754 F.2d at 697. Furthermore, the Court explained that fee awards are an equitable matter, and thus, in determining the amount of fees to be awarded in a given case, the district judge should balance the equities involved. Accordingly, the Court concluded that it was appropriate for the district judge in that case to consider the plaintiff's claim that im-position of the full lodestar amount was improper because of his indigency.

Self-evidently, Munson is not at odds with the decision of the Second Circuit here. On the contrary, both cases proceed from the identical underlying premise that -- district courts should be afforded broad discretion with respect to the amount of attorneys fees to be awarded. Moreover, Munson

is just one example illustrating that the Seventh Circuit -- like the Second Circuit --does not subscribe to the rigid mathematical approach which is the cornerstone of the City's position at bar.

Similarly, in Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980), the Seventh Circuit specifically rejected the notion that the district court has no discretion to award attorneys fees in an amount below the lodestar. In fact, the Court quoted approvingly from its prior decision in Waters v. Wisconsin Steelworks, 502 F.2d 1039, 1322 (7th Cir. 1974), cert. denied, 425 U.S. 997, 96 Ct. 2214 (1976), where the issue was squarely addressed:

> In fashioning a method of analysis to assist in determining the amount of attorneys fees properly to be awarded . . . we cannot subscribe to the view that attorneys fees are to be deter-

> mined solely on the basis of a formula applying "hours spent times billing rate." We recognize, however, that such a factor is a consideration in making the ultimate award and indeed it is a convenient starting point from which adjustments can be made for various other elements . . .

614 F.2d at 579 (emphasis added).

Of course, this flexible approach is fully consistent with the Second Circuit's view of how the amount of "a reasonable attorneys fee" is to be determined. See also Nixon v. Individual Head of St. Joseph Mortg. Co., 612 F.Supp. 253 (D.C.Ind. 1985), aff'd, 787 F.2d 595 (7th Cir. 1986) (attorneys fee award to defendants of $250 for each attorney who defended case was appropriate Rule 11 sanction under circumstances of case). See generally Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987) (Remanding case to district court for

determination of amount of appropriate sanction).

The Seventh Circuit's decision in Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980), also confirms that Circuit's position is in harmony with that of the Second Circuit. In Brown, the Seventh Circuit again confirmed that courts have broad discretion with respect to the amount of attorneys fees to be awarded, and that, in exercising that discretion, awards which fall below the lodestar may be entirely appropriate in a given case. As the Court explained:

> The statute here involved [42 U.S.C. § 1988] entrusts to the District Court discretion to determine the quantum of the fee to be awarded. Small as well as large fees are permissible. The court's discretion to determine the amount may in an appropriate case approach zero as a limit. (612 F.2d at 1059).

Thus, Munson and the other deci-

sions cited above make it clear that the Seventh Circuit has consistently held that the amount of attorneys fees to be awarded rests within the sound discretion of the district court, and that the court has discretion to award an amount below the lodestar in a given case. Accordingly, petitioners' claim that the Seventh Circuit has taken a position which is directly in conflict with the Second Circuit's holding in this case, is simply wrong.

Similarly, petitioners are in error in claiming that the decision of the Second Circuit in this case is contrary to the Fourth Circuit's holding in Arnold v. Burger King, 719 F.2d 63 (4th Cir.), cert. denied, 469 U.S. 826 (1983).

In Arnold, the Fourth Circuit reiterated its view (which is wholly in accord with the Second Circuit's deci-

sion here) that the amount of an attorney's fee award is within the discretion of the district court. 719 F.2d at 67 (citations omitted). Furthermore, the Court pointed out that the lodestar amount is only a "starting point" for determining the appropriate amount of the award in a given case. As the Court explained, the district court is free to adjust the lodestar, either upward or downward, based on a variety of factors relevant to the particular case.

The Court in Arnold specifically referred to the twelve factors identified in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), which have traditionally been considered as appropriate guideposts in determining the amount of an award of attorneys fees. In fact in Arnold the Court felt that other factors, beyond

those enunciated in Johnson --such as the relative wealth of the parties -- may be relevant in a particular case. Of course, consideration of all of these factors would be meaningless if the mathematical lodestar methodology urged by the City was applied.

As the Fourth Circuit in Arnold summarized it, and as is fully consistent with the Second Circuit's holding in this case, "the trial court has broad discretion to reduce the fee award in light of mitigating factors . . . ." Id. at 68. Furthermore, the plaintiff's financial circumstances is "but one among the several other relevant factors" be relevant in a given case. Id. Thus, contrary to the City's assertion at bar, under Arnold, factors other than the plaintiff's ability to pay may properly be taken into account in determining whether a

fee award in an amount below the lodestar is appropriate.

Moreover, the Fourth Circuit's most recent fee award case, Cleveland Demolition Co., Inc. v. Azcon Scrap Corp., Nos. 86-114(L), 86-1266 (4th Cir. Sept. 4, 1987) (Available on LEXIS), confirms that it is in agreement with the Second Circuit that the trial court has discretion to award attorney's fees which are below the lodestar amount.

Cleveland was an action under Fed.R.Civ.P. 60(b) to set aside a jury verdict for Azcon Scrap on the grounds that Azcon's trial attorney had conspired with a witness to present perjured testimony. The only evidence of this alleged conspiracy, however, was a conflict between the witness' testimony and statements made by a different party in a separate lawsuit. Accord-

ingly, the district court granted summary judgment for Azcon and imposed Rule 11 sanctions on Cleveland and its attorney.

In determining the amount of the sanctions to be imposed, the district court reduced Azcon's legal fees by 10%. On appeal, the Fourth Circuit affirmed this reduced amount, noting that the downward adjustments which were made were consistent with the Johnson factors. In Cleveland, as in the case at bar, the district judge's reduction of the amount was upheld on appeal even though no showing had been made that the plaintiff was financially unable to pay the full lodestar amount.

Petitioners also make the unsupported claim that the Second Circuit's decision in this case is in conflict with its prior decision in Faraci v. Hickey-Freeman Co., 607 F.2d 1025 (2d

Cir. 1979). In Faraci, as in the instant case, the Second Circuit emphasized that fee awards are a matter within the discretion of the trial judge, and that in determining the appropriate amount of an award of attorneys fees, equitable principles govern.

Contrary to the petitioners' claim in this case, the Second Circuit in Faraci did not reduce the fee award below the lodestar amount simply because the plaintiff in that case had established that he was financially unable to pay that amount. Rather, the Court explicitly stated that in addition to the plaintiff's financial circumstances, it had also considered other factors in deciding to award an amount below the lodestar. Specifically, in determining the size of the award, the Court stated it was also relying upon the fact that the plain-

tiff had prosecuted the action and appeal in good faith, and that this factor also justified an award which was less than the lodestar.

Thus, once again, the purported conflict between the circuits, asserted by the petitioners is shown, upon closer examination, to be no conflict at all. In fact, the Second Circuit in this case even cited its earlier decision in Faraci as just one example of the myriad cases in which an amount below the lodestar was deemed appropriate. Simply put, Faraci is entirely consistent with the Second Circuit's decision in this case.

C. The Second Circuit's Decision Is In Harmony With This Court's Decisions On The Amount Of An Award Of Attorneys Fees.

In arguing that certiorari should be granted in this case, the petitioners also claim that the Second Cir-

cuit's decision is at odds with the decisions of this Court which have emphasized the importance of the lodestar in awarding an attorney's fee. In fact, the petitioners even go so far as to make the totally unfounded assertion that "the majority implicitly held that the lodestar is of little importance when an attorney's fee is awarded." Of course, the Second Circuit said nothing of the sort, either expressly or implicitly. Moreover, as is established below, its holding that district courts have discretion to award attorneys fees in an amount below the lodestar is not contrary to the decisions of this Court.

The question of how to calculate a "reasonable" attorney's fee was first addressed by the Court in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1983). In that case, the Court

held that the lodestar method of calculation provided a "starting point" for determining the amount of a reasonable attorneys fee. The Court noted, however, that this calculation is to be viewed as an "initial estimate" only. Id. at 433, 103 S.Ct. at 9139. Moreover, the Court went on to state that:

> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district to adjust the fee upward or downward . . . ." (Id. at 434, 103 S.Ct. at 1940.)

Thus, the Hensley decision is fully consistent with the Second Circuit's ruling at bar. Hensley does not mandate that full lodestar be levied; rather, it simply holds that the "lodestar approach" is a "useful starting point" for determining the amount of a reasonable fee. As the Court in Hensley further wrote:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

Id. at 435, 103 S.Ct. at 1941 (emphasis added).

Similarly, the Court's decision in Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541 (1984), and Pennsylvania v. Delaware Valley Citizen's Council, ____ U.S. ____, 106 S.Ct. 3088 (1986), are not at odds with the Second Circuit's decision in this case. Neither of those decisions held, either explicitly or implicitly, that a district judge lacks discretion to award attorneys fees in an amount below the lodestar. On the contrary, those cases simply reaffirmed that the lodestar is the first step in determining whether an attor-

neys fee is "reasonable". Apart from that, the Court in those cases was addressing whether and under what circumstances an award above the lodestar figure may be justified, since both Blum and Delaware Valley involved a claim that the fee should have been increased to reflect the superior quality of representation. In fact, when the Delaware Valley case reached the Court again, Pennsylvania v. Delaware Valley Citizens' Council, ____ U.S. ____, 107 S.Ct. 3078 (1978), the Court confirmed that it was only addressing the extent to which the use of a multiplier in setting a fee award under the fee-shifting provisions of the Clean Air Act was permissible. Thus, neither Blum nor Delaware Valley has particular applicability to the circumstances extant, and thus the petitioners' claim that the decision of the majority below

is at odds with this Court's decision in those cases is simply unfounded.

Furthermore, in conjunction with the City's claim that this Court should divest the district courts of their discretion to award attorneys fees in an amount less than the lodestar, the Court's comments in National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 96 S.Ct. 2778 (1976), are particularly instructive. As the Court wrote in that case, "the question for us is not whether we would have ordered the same sanctions but "whether the District Court abused its discretion in so doing." Id. at 642, 96 S.Ct. at 2780. Clearly there was no abuse of discretion here.

D. The Second Circuit's Decision, Far From Creating Confusion and Uncertainty, Actually Provides the District Courts With Guideposts to Follow In Determining the Amount of an Appropriate Fee Award in a Given Case.

The City's final claim in petitioning this Court for certiorari is predicated upon the totally unsupportable assertion that the Second Circuit's approach to this case was illogical and confusing, and fail to provide the district courts with any guidance on how to exercise their discretion in a given case. Once again, petitioners are grossly in error.

As is fully set forth in the Preliminary Statement supra, the district judge that considered the award of attorney's fees in this case, Chief Judge Weinstein (E.D.N.Y.), engaged in a thoughtful and scholarly analysis of the factors to be considered in determining the appropriate amount of an attorney's fee award. As noted, Chief Judge Weinstein identified seven different factors which bear upon the amount of the fee. Specifically, the

district court held that the following "mitigating" factors should be considered in calculating an appropriate fee award (A75-76):

> (i) whether the client and lawyer believed they were correct in taking the course they did; (ii) whether there was vindictiveness or a desire to punish an opponent; (iii) whether the lawyer is a neophyte who needs education, a repeat offender, or a person of standing at the bar whose actions have heretofor been ethical and in the high tradition of the bar; (iv) the ability to pay; (v) the need for compensation; (vi) the degree of frivolousness; and (vii) the dangers in chilling the particular litigation involved.

In reviewing Chief Judge Weinstein's decision in this case, the Second Circuit explicitly held that the trial judge had engaged in the appropriate analysis, and had appropriately considered the factors relevant to the amount of a fee award. In fact, in characterizing the district court's ap-

proach to determining the amount of attorney's fees to be imposed in this case, the Court stated:

> In this case, Chief Judge Weinstein has thoughtfully considered a variety of factors bearing on the appropriate amount of the fee to be awarded as a sanction . . . . we agree with his general conclusion that a fee substantially less than a lodestar amount is permissible. (All)

Thus, contrary to the petitioners' assertion that the Second Circuit's decision invites confusion, uncertainty and excessive satellite litigation, precisely the contrary is true. In identifying the "mitigating factors" to be taken into account in determining the amount of an appropriate fee award, specific guideposts have been provided for district judges to follow in future fee award cases. Accordingly, petitioners' argument to the contrary must be rejected.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for Writ of Certiorari should be denied in all respects.

Date: New York, New York
September 23, 1987

Respectfully submitted,

LaROSSA, MITCHELL & ROSS

By: James M. LaRossa

James M. LaRossa
Attorneys for Respondents
41 Madison Avenue
New York, New York 10010
(212) 696-9700

JAMES M. LaROSSA
JOHN W. MITCHELL
KAREN F. SILVERMAN

Of Counsel

SUPREME COURT, U.S.
FILED
OCT 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-359

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE CITY OF NEW YORK, et al.,

Petitioners,

-against-

EASTWAY CONSTRUCTION CORP., et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETER L. ZIMROTH,
Corporation Counsel of
the City of New York,
Attorney for Petitioners,
100 Church Street,
New York, N.Y. 10007.
(212) 566-4328 or 4338

LEONARD J. KOERNER,*
FRED KOLIKOFF,
of Counsel.

October 2, 1987

*Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
ARGUMENT	2
CONCLUSION	12

TABLE OF AUTHORITIES

Page

Cases

Eastway Construction Corp. v. City of New York ("Eastway III"), 821 F.2d 121 (2d Cir. 1981)..... passim

Hensley v. Eckerhart, 461 U.S. 424 (1983) 8

Munson v. Friske, 754 F.2d 683 (7th Cir. 1985) 6

Murphy v. Kolovitz 635 F.2d 662 (7th Cir. 1981) 6

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, ____ U.S. ____, 106 S. Ct. 3088 (1986) 8-11

Statutes

42 U.S.C. §1988 (Civil Rights Attorney's Fees Act of 1976) 3

Fed. R. Civ. P. 11 3

Page

Other Authorities

Lawrence M. Greenberg, "The Rule 11 Debate, Circuit Court Gives No Guidance in Eastway", National Law Journal, September 14, 1987, page 19, col. 4 5

No. 87-359

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE CITY OF NEW YORK, et al.,

Petitioners,

-against-

EASTWAY CONSTRUCTION CORP., et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

The petitioners, the City of New York, Nathan Leventhal, Anthony G. Gliedman, and Charles Reiss, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the

Second Circuit entered in the above-entitled proceeding on June 8, 1987. The Petition for a Writ of Certiorari was docketed in this Court on August 28, 1987. This Reply Brief is being submitted in support of the Petition and in response to the Brief in Opposition to the Petition, dated September 23, 1987, filed by Respondents (hereafter "Resp. br.").

ARGUMENT

Respondents' brief in opposition to the petition is based on a misrepresentation of the Second Circuit's decision which is the subject of this petition, a misrepresentation of petitioners' argument to his Court, and a misrepresentation of the relevant case law in the area.

1. Respondents misrepresent the decision below.

The decision which is the subject of the petition is Eastway Construction Corp. v.

City of New York ("Eastway III"), 821 F.2d 121 (2d Cir. 1987) (reprinted in the Appendix to the Petition at page A1). In that decision, the majority held that the District Court erred in awarding petitioners $1000 in attorney's fees under 42 U.S.C. §1988 and Fed. R. Civ. P. 11. The majority held that the fee award should be $10,000. However it did not explain why $10,000 was preferable to $1,000 or to the lodestar figure of $52,912.50. The majority explicitly disavowed any reliance on the factors that the District Court relied on in reducing the fee to $1000. Thus, the majority said, "Without necessarily endorsing the pertinence of each factor [relied on by the District Court Judge], we agree with his general conclusion that a fee substantially less than the lodestar amount is permissible". (A11) (emphasis added). The majority did not indicate which, if any, of the factors relied

on by the District Court formed the basis of its decision.

The dissent disagreed with the majority's unexplained award of an arbitrary figure which had no relationship to the lodestar. (A17-A27).

In their brief to this Court, respondents misrepresent the decision in Eastway III in two ways. First, their brief makes no reference to the vigorous and well reasoned dissent. Respondents' brief reads as if the dissent does not exist. Second, and more importantly, respondents pretend that the majority in Eastway III relied on and adopted the District Court's decision even though the majority increased the award by a factor of 10 and disavowed reliance on any of the District Court's factors. Respondents quote a passage from the majority decision at page 34 of their brief in support of this position. This

quotation is very misleading because the ellipsis masks the following critical phrase: "Without necessarily endorsing the pertinence of each factor [relied on by the District Court] ..." (A11).

It should be noted that petitioners are not alone in believing that the majority opinion in Eastway III fails to explain the factors on which the majority relied in fixing the award at $10,000 and hence is confusing and provides no guidance to other courts. One commentator has said, "[T]he 2d Circuit simply increased the fee from $1,000 to $10,000 ..., without any discussion or suggested criteria as to how or why Judge Weinstein's award was an abuse of discretion." Lawrence M. Greenberg, "The Rule 11 Debate, Circuit Gives No Guidance in Eastway," National Law Journal, September 14, 1987, page 19, col. 4, at page 22, col. 1.

2. Respondents misrepresent the petitioners' position.

Throughout their brief, respondents misrepresent petitioners' position and state that petitioners are arguing that, whenever a litigant is to receive a reasonable attorney's fee, the award must always be the lodestar. That is not petitioner's position. Petitioner's position is that the lodestar is presumptive the measure of a reasonable fee award. This presumption may be rebutted if evidence is submitted which will justify a lesser or greater award, but a court, in awarding a greater or lesser award, must articulate its reasons for doing so. See, Munson v. Friske 754 F.2d 683, 697 (7th Cir. 1985) ("[a] court must offer some articulation of the reasons supporting the amount of its award [citation omitted]."); Murphy v. Kolovitz, 635 F.2d

662, 663-664 (7th Cir. 1981) (since a prevailing plaintiff in a civil rights suit is presumptively entitled to an award of attorney's fees, a district court must articulate the special circumstances which warrant a denial of fees when it denies fees to such a plaintiff).

In Eastway III, the majority did not explain why it was awarding petitioners less than 20% of the lodestar. Given the decision below, petitioners cannot challenge the majority's reasons for reducing the award because it did not articulate them.[1] Therefore, we argue that the majority below

---

[1] If the majority had relied on the District Court's analysis, petitioners would argue, as we argued before the Second Circuit, that this analysis should be rejected because some factors used by the District Court were improper, others were given too much weight, and as to others, no evidence was taken by the Court to justify its conclusions.

erred in not giving its reasons for diverging from the lodestar by 80%.

3. Respondents misrepresent the case law in this area.

In our Petition to this Court, we argued that Hensley v. Eckerhart, 461 U.S. 424 (1983), and its progeny, establish that the lodestar is presumptively the measure of a reasonable attorney's fee and a court should not diverge from the lodestar unless it can articulate a very good reason for doing so. (Petition, pp. 32-38). Respondents contend that these cases hold that the lodestar is merely an "initial estimate" or "first step" in computing a fee. (Resp. br., pp. 27-31). The fact that respondents are quite clearly wrong is demonstrated by the following passages from Pennsylvania v. Delaware Valley Citizens'

Council for Clean Air, ___ U.S. _____, _____, 106 S. Ct. 3088, 3098, (1986):

> We further refined our views in Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Blum restated that the proper first step in determining a reasonable attorney's fee is to multiply "the number of hours reasonably expended on the litigation times a reasonable hourly rate." Id., at 888, 104 S.Ct., at 1544. We emphasized, however, that the figure resulting from this calculation is more than a mere "rough guess" or initial approximation of the final award to be made. Instead we found that "[w]hen ... the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee" to which counsel is entitled. Id., at 897, 104 S.Ct., at 1548 (emphasis added). [Emphasis added].

Blum also limited the factors which a district court may consider in determining whether to make adjustments to the lodestar amount. Expanding on our earlier finding in Hensley that many of the Johnson factors "are subsumed within the initial calculation" of the lodestar, we specifically held in Blum that the "novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award. Id., at 898-900, 104 S.Ct., at 1548-1550. Although upward adjustments of the lodestar figure are still permissible, id., at 901, 104 S.Ct., at 1550, such modifications are proper only in certain "rare" and "exceptional" cases, supported by both "specific evidence" on the record and

> detailed findings by the lower courts. See Id., at 898-901, 104 S.Ct., at 1548-1550.
>
> A strong presumption that the lodestar figure - the product of reasonable hours times a reasonable rate - represents a "reasonable" fee is wholly consistent with the rationale behind the usual fee shifting statute, including the one in the present case. [Emphasis added].

* * *

The foregoing clearly shows that this Court has held that the lodestar is more than just a starting point for the calculation of a fee. Since this Court has held that there is a "strong presumption," Id., that the lodestar is a reasonable fee, the majority in Eastway III acted contrary to principles established by this Court in awarding petitioners only a fraction of the lodestar without articulating its reasons for so doing.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

PETER L. ZIMROTH,
Corporation Counsel of
the City of New York,
Attorney for Petitioners.

LEONARD J. KOERNER,*
FRED KOLIKOFF,
of Counsel.

*Counsel of Record

October 2, 1987